

(25,625)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 795.

ALBERT E. SUTTON, RACHAEL E. KIRTLEY, DELANA H.
SUTTON, ET AL., APPELLANTS,

v. s.

JOHN H. C. L. ENGLISH ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TEXAS.

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a Be it remembered that at a stated term of the District Court of the United States in the Fifth Circuit thereof, and in and for the Eastern District of Texas, at Sherman, begun and holden at Sherman, Texas, on the 22d day of May, A. D. 1916, and which term adjourned on the 3d day of June, A. D. 1916, the Honorable Gordon Russell, United States District Judge for the Eastern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial, and was tried, to-wit:

In Equity. No. 47.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH et al.

1 In the District Court of the United States, Held in and for the Eastern District of Texas, Sherman Division.

ALBERT E. SUTTON, DE LANA M. SUTTON, RACHAEL E. KIRTLEY, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Krickbaum, Complainants,

v.

JOHN H. L. C. ENGLISH, F. S. FINLEY, J. T. ROBINSON, W. E. Foster, Superintendent of Public Instruction of Collin County, Texas; and District Trustees of District Number 67, in the County of Collin, and State of Texas, a Municipal Corporation; Cora D. Spencer and Robert L. Clayton, Defendants.

Bill in Equity.

To the Honorable the Judge of the District Court of the United States for the Eastern District of the State of Texas:

Your petitioners respectfully show unto your Honor that this action is a civil action wherein there is diversity of citizenship between the parties plaintiff and the parties defendant, and the amount in controversy is more than the sum of Five Thousand Dollars, exclusive of interest and costs, being in fact the sum and amount of One Hundred sixty Four thousand Dollars and more, and the amount in controversy upon the part and in the behalf of each complainant is more than the sum of six thousand dollars. Your petitioners who are complainants respectfully aver and show unto your Honor, that the plaintiff, Albert E. Sutton, is a citizen, resident and inhabitant of the town of Kay-Cee, in the County of Johnson, and State of Wyoming, and the plaintiff, Delana M. Sutton is a citizen, resident and inhabitant of the town of Harrison, in the County of Sioux, and State of Nebraska, and the plaintiff Rachael E. Kirtley is a citizen^m resident and inhabitant of the City of Hot Springs, in Fall River County, and State of South Dakota,

and the plaintiff, Helen M. Marshall is a citizen, resident and inhabitant of the town of Jerseyville, in the County of Jersey and the State of Illinois, and the plaintiff Elizabeth E. Davis, is a citizen, resident and inhabitant of the Town of Harrison, County of Sioux of Nebraska, and the plaintiff George D. Sutton, is a citizen, resident and inhabitant of the town of Jerseyville, and County of Jersey and State of Illinois, and the plaintiff, Ida Krickbaum is a citizen, resident and inhabitant of the city of Ft. Collins, and County of Larimer, and State of Colorado, and such residence, citizenship and inhabitancy prevailed at all the dates hereinafter mentioned, and prior to the seventh day of February, A. D. 1914.

2 And the plaintiffs allege further that now, and at all the dates hereinafter mentioned and prior to the seventh day of February, A. D. 1914, each Robert L. Clayton, and F. S. Finley and J. T. Robinson and John H. L. C. English was a citizen, resident and inhabitant of the town of Celina, in Collin County and State of Texas, and W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, was a resident citizen and inhabitant of the City of McKinney and County of Collin and State of Texas, and Cora D. Spencer was a citizen, resident and inhabitant of Weston, in the said County of Collin and State of Texas, and the defendant District Trustees of District Number 67, in the County of Collin and the State of Texas, is a municipal corporation in and for the said district and the County of Collin and State of Texas, and each and every of the said defendants is within the Sherman Division of the Eastern District of the State of Texas.

And petitioners allege that this action is for the construction of a will whereunder plaintiffs claim an inheritance in lands within the counties of Collin and Denton in the said division, district and State of Texas; and for an accounting by the said defendants English and Finley and Robertson and the quieting of title in plaintiffs to said real estate and to personal property in the possession of the said defendant English and all within the Counties of Collin and Denton, in said division, district and State.

Your petitioners allege that the interest of each plaintiff in the subject of controversy, which is hereinafter described, arises out of the following circumstances: That about 1866, Moses Hubbard and Mary Jane Hubbard, husband and wife, settled on a parcel of real estate hereinafter described, in Collin County, Texas, and from that time continuously until the dates of their respective deaths, each lived as a citizen, resident and inhabitant of the said County and State, and during their joint lifetime they lived and cohabited together as husband and wife and as one family until the said Moses Hubbard departed this life on May 26, 1906, leaving him surviving, the said Mary Jane Hubbard, his wife, and no descendant and no other heir. And the said Mary Jane Hubbard of the said County and State, departed this life on February 7, 1914. That at the time of the death of the said Mary Jane Hubbard, she left no children nor husband, but she left surviving: Rachael E. Kirtley, and Albert E. Sutton, and Delana M. Sutton, her brothers; and she left also surviving her the children of a deceased brother, Lewis Sutton, and the names of

3 the said children who survived the said Mary Jane Hubbard were: Cora D. Spencer, Elizabeth E. Davis, Ida Krickbaum, George D. Sutton and Lewis Sutton, Jr. And that the said Lewis Sutton, Jr. departed this life intestate at Jersey County, Illinois, on Sept. 2, 1914, unmarried and without descendants and left as descendants his mother Helen M. Marshall, and his sisters the said Cora D. Spencer, Elizabeth E. Davis and Ida Krickbaum and one brother, Geo. D. Sutton, and these last are the only heirs at law of the said Mary Jane Hubbard and Moses Hubbard.

That the said Moses Hubbard and Mary Jane Hubbard, husband and wife, at the time when they domiciled thus in Collin County, Texas, were entirely without means or property; and by their joint labors and earnings and saving, they had accumulated as community property, belonging to them, the real estate hereinafter described, in the sum of about 983 acres, and also their household and kitchen furniture, and cow and calf, which was exempt together, with the homestead of 200 acres; and also personal property owned by the said community, consisting of notes and shares of the capital stock of the Celina Mill and Elevator Company, all in Collin County; and the shares of capital stock of the Pilot Point National Bank, Denton County, Texas; and shares of stock in the D. C. Telephone Company, which community was of about the value of \$100,000.

That there had been born unto the said Moses Hubbard and Mary Jane Hubbard, one daughter and no other child, and the said daughter had predeceased her said father and mother, and she left no descendants. By reason of the said community property in its general characteristics of the matter of an estate by entireties; and the whole and every portion thereof descended unto the survivor of the said community, the said Mary Jane Hubbard.

Plaintiffs allege further that the said Mary Jane Hubbard had accumulated in addition to the said community property, which was hers, separate property by her own exertions amounting in value to about \$18,000, consisting of a dwelling house and the ground whereon the same stood; and notes and household goods and jewelry; and stock in two banks and money on deposit in a bank.

Plaintiffs state further that at the time of the last sickness of the said Mary Jane Hubbard, and while she was in the very article of death and then almost 71 years of age, in the absence of the plaintiffs from her deathbed side and without their knowledge or procurement, she was persuaded and influenced into the execution of an

4 instrument in the form of a will wherein and whereby she purported to dispose of the accumulations and separate property of herself. A copy of said will is filed herewith and marked exhibit "A" to this bill and is made a part hereto by the said identification; and prayed to be deemed and taken as a part of this bill, as fully as if the same were included and set out at length herein. And plaintiffs say that there was no reference or mention in said purported will of any plaintiff except Rachael E. Kirtley, who consents that the said purported will may be avoided and held of none effect, and offers hereby to throw into Hotch-Potch the bequest unto her, which consists of 20 shares of the capital stock of

the Celina State Bank. And the plaintiffs say that on February 5, 1914, when the said writing was made, the said Mary Jane Hubbard was clouded in her intellect; and that she was not of sound or disposing mind or memory; and that she did not remember the plaintiffs except the said Rachael E. Kirtley, although she desired and intended to do so. That the name of said plaintiff was not remembered by said Mary Jane Hubbard, but was suggested by John H. L. C. English, as also every other item thereof. And that her mind and memory at the time of signing the purported will was weak and imbecile to the extent that she did not comprehend the contents of it; and that she was induced to sign the same by the undue influence of the defendant English, by purpose and through motives of his own. And that the same ought to be annulled and set aside and held for naught; nevertheless, these plaintiffs do not desire to interfere with the distribution made by the defendant, Clayton, purporting to act as executor of said will, but they bring this bill for the purpose of having it annulled to the extent only that the 12 paragraph, which is in the words and figures following, to wit:

"12. I give and bequeath all the residue of my property that has not been bequeathed, to my loving niece, Cora D. Spencer to have and to hold forever: be decreed and determined forever more, not to be a testamentary disposition of that portion of her separate estate, which had once been community estate of the said Moses Hubbard and Mary Jane Hubbard; and that the said community property should be held and decreed to pass unto the plaintiffs in the proportions hereinafter described, pursuant to the provisions of Article 3235 of the Civil Statutes of the State of Texas, as estate which is not divided or bequeathed, and by reason whereof should be divided immediately to the plaintiffs in the following proportions:

	Unto Rachel E. Kirtley.....	1/ 4
	" Albert E. Sutton.....	1/ 4
	" De Lana M. Sutton.....	1/ 4
5	Unto George D. Sutton.....	1/16
	" Elizabeth E. Davis.....	1/16
	" Ida Kirekbaum.....	1/16
	" Helen M. Marshall.....	1/16

The plaintiffs allege further that for many years prior to her said decease, the said Mary Jane Hubbard was not stable in her actions or determinations; and not fully mistress of herself, nor her acts nor property; but that she was unduly influenced by and was absolutely subject to the control of the defendant English, who managed and controlled and dictated to her concerning her property and proceeds and proceeds thereof, without regard to her will or her interest; and compelled her to submit to his control, and substituted his will for hers in many actions for a long period of years, and in truth and in fact, he exercised such malignant control during his lifetime over the said Moses Hubbard, which influence was actuated by his fostering and encouraging and catering to a mania of the said Moses Hubbard in his lifetime, and his a-jurations relative thereto after

the death of said Moses Hubbard, were imposed and coerced upon the mind of the said Mary Jane Hubbard and overpowering her will and wish in relation to the said community property.

The plaintiffs allege that the said Moses Hubbard was subject to a mania or unsound idea relative to the memory of his deceased daughter, Alla Hubbard Spencer, and was controlled thereby in his investments and transactions that he spent a considerable amount of money to procure the manufacture of a brand of flour called the Alla Brand, by the Celina Mill and Elevator Company. And that he erected a cheap building for school purposes within the limits of Roseland, District 67, whose trustees are defendants herein, and did other acts in pursuit of the same delusion. And that he attempted a disposal of the community property of his said wife by a purported will, which was executed by him after he was 71 years of age, in the year 1897, a copy of which will, marked exhibit "B" to this bill is filed herewith, and prayed to be taken as a portion of this bill and paragraph as though set out here in words; and by the terms whereof it was attempted to establish and create in said community property, after it should become separate property of Mary Jane Hubbard, a charitable trust, in perpetuity of the claims therein, described in the following language:

6 "We have founded an institution for increase and diffusion of knowledge, which we have named Alla, and which shall remain permanently, located on the same survey on which it is located, to wit: Wade H. Rattan, and it is our desire that the trustees herein provided for, shall use the available fund in the employment of teachers, erection of proper and necessary buildings, the purchase of apparatus, and other germane uses; and desire that at this school or institution of learning, all children whose parents are Caucasian and of the white race, and over the age of 6 and under the age of 21, shall be admitted free of tuition; but in case more apply than the funds will justify, then the trustees in determining who shall be admitted, are requested to give preference to worthy students who have been in attendance before, and those residing in the school district or adjacent thereto."

Plaintiffs allege further that the said trust is void because it is indefinite as to parties beneficiary; and because the maker of the said will had established no institution and none was in existence except the defendant district; and because it was beyond the power of the defendants named as trustees, to admit or compel or procure the attendance therein of non-resident scholars who are beyond the scholastic age; and for the further reason that Mary Jane Hubbard and Moses Hubbard were constituted therein as intermediate beneficiaries, ahead of said trust and for the further reason that the said Moses Hubbard was not of sound and disposing mind and memory; and for the further principal reason that the said purported will did not contain language whereby any gift or devise or bequest or conveyance was made and because the property therein referred to was all community property, whereof the survivor was to become and did become sole owner and possess, free from the testamentary

disposition if any was made: but in fact none was made by the said Moses Hubbard.

And plaintiffs say that if the said instrument had any effect in law, which these plaintiffs declare was not had thereby then there was created a naked trust, whereof the said Mary Jane Hubbard was sole beneficiary and the persons named therein defendants, who claim to be trustees, had no interest and by the law of the land the trust was executed and determined, in, and for the sole benefit of, the said Mary Jane Hubbard.

Plaintiffs further allege that the defendants trustee never sought a settlement with the executors over the purported will and never received from nor receipted thereunder unto the said executors for any of the property and they never, until the proceedings herein-
7 after related, made claim to any person related, nor at any time as trustee, but all of them attempted to make private use of the said property, both real and personal without authority either in law or in equity; and to convert the property and the proceedings thereof, unto the private use and benefit of the said defendant English, and to that end conveyed and converted a portion of the said personal property into real estate, whereof he took the title unto himself, through the said conversion ex maleficio of 515.18 acres located in the County of Denton and State of Texas aforesaid, and described as follows:

Known as the William Carter Survey located near Big Elm River about 14 miles southeast of the City of Denton, in Denton County, Texas; Beginning at a stake the northwest corner of said Carter survey; thence west 1480 varas to the east side of a lake; thence south 84 degrees west 221¼ varas to the west bank of lake; thence west 211 varas a rock the northwest corner of said Carter survey; thence south 1¼ degrees east 166 varas the north bank of lake and continuing south in all 1515 varas a stake the southwest corner of said Carter survey; thence north 89¼ degrees east with marked line 960 varas; thence north 88½ degrees east 960 varas a post the S. E. corner of said Carter survey; thence north 1 degree 37' west 1500 varas to the place of beginning, containing 515.18 acres of land, more or less.

Plaintiffs allege further that afterwards, in an attempt to increase his possessions and control, the said English, nominally joining with himself the other defendants herein named and claiming to be trustees, towit:

John H. L. C. English, F. S. Finley, J. T. Robinson, W. E. Foster,
Signed in the District Court, Collin County, Texas, a petition which petition was filed on January 11, 1913, wherein was alleged that the will hereinbefore referred to, marked exhibit "B" was a joint will, "under a compact, agreement and contract" mutually binding on each, and the same after the death of the said Moses Hubbard; and the purporting of the said will was irrevocable by either the said Moses Hubbard or Mary Jane Hubbard; and also "That under the premises of said will, the said Mary Jane Hubbard received rights and emoluments and privileges, which she would

not have had but for the said will; that the said Mary Jane Hubbard accepted under said will and has at all times since the probating thereof, accepted and exercised those rights, privileges and emoluments; and by reason of the premises, said will is irrevocable
 8 by the said Mary Jane Hubbard" and alleging that a trust was created by said will in behalf of the said English, Finley, Robinson and Foster; and prayed for citation thereon and judgment for the title to the premises, therefor that a trust be declared in their favor; but these plaintiffs allege that no citation was issued and the said Mary Jane Hubbard had no notice of the said actions nor proceedings in the premises and that she was deceived, as plaintiffs are informed, into signing a purported waiver and disclaimer therein, but the same was without the knowledge or understanding of the said Mary Jane Hubbard, and by chicane and deceit; and was wholly without consideration and was void because it was a misuse of the forms of law; and the judgment was never given nor signed by any judge or person possessing judicial power, within the State of Texas.

And especially by reason of the fact that the said petition was in effect both in law and in equity an application for the construction of the said paper as the will of Moses Hubbard, whereof the District Court had not jurisdiction in the first instance, and for which construction of which said instrument there was then and yet pending in the county probate court of Collin County, Texas, a petition signed by the said purported trustees whereupon the judgment of the said County Court will, and would be binding and exclusive upon said purported trustees, without and beyond, and free from the assumption of power in the district court of the said county. And, moreover, the person who assumed to act as judge for that cause was without power or authority, for the reasons stated above which also prevailed in relation to said Mary Jane Hubbard in her signature, as to his selection, on her part. And plaintiff says that the real estate originally usurped and taken possession of by the said John H. L. C. English, is properly described as follows:

Tract No. 1.

Situated in Collin County, Texas, on the divide between Honey Creek and Little Elm Creek, the same being $54\frac{3}{4}$ acres deeded to J. F. Fleming and Sarah Fleming and C. P. Fleming and M. J. Fleming by Marion A. Maples and wife by deed dated July 24th, A. D., 1899 and recorded in Book 93, pages 324-5-6 & 7 Collin County Records of Deeds. Beginning at the southwest corner of a 40 acres tract conveyed to R. H. Tillerson by J. R. Geer and wife, N. N. Geer; thence west 30.28 chs. to a rock the northwest corner of the Queen survey; thence north 11.50 chs to a bois d'arc stake on
 9 the north line of the G. W. Estes 74 acre survey; thence east 9.33 chs to the northeast corner of said Estes survey; thence north 9.50 chs a rock; thence east 20.95 chs to the northwest corner of said Tillerson 40 acre tract; thence south 21 chs to place of beginning, containing $54\frac{3}{4}$ acres of land more or

less, 24.1 acres in the W. B. Tucker 19.9 acres in the W. W. Shawver and $10\frac{3}{4}$ acres in the G. W. Estes survey.

Tract No. 2.

Situated in said County on the waters of Little Elm about 14 miles n. 40 w. from McKinney, being the whole survey of 640 acres in the name of the heirs of W. H. Rattan, Abst No. 609 and Beginning at S. M. Boyd's S. W. corner a post from which a cluster of Hackberrys brs n. 6 E. 231 vrs; thence west with J. M. Herrins N. line 1874 vrs a post from which an elm brs. N. $28\frac{1}{2}$ e. 413 vrs another brs N. 34 E. 423 vrs; thence north 1644 vrs a post from which a willow brs N. $73\frac{1}{2}$ E. 243 vrs; thence east 2613 vrs, a post on Saml. Queen's west line from which an elm brs. N. 48 E. 80 vrs. thence south 718 vrs, said Queen's S. W. corner; thence west 738 vrs, said Boyd's N. W. corner; thence south 927 vrs to the beginning, bearings mkd X, containing 640 acres more or less.

Tract No. 3.

Situated on the waters of Honey Creek in Collin County and being a part of the Headright survey and being a part of the Thompson Helms and bounded as follows: Beginning in the center of Honey Creek a short distance above the Lacy Spring a point from which a cottonwood mkd. X brs. N. $4\frac{1}{2}$ deg. west 44 links, also a double black oak brs. south $64\frac{1}{2}$ east 62 lks.; thence down the center of Honey Creek to the mouth of a certain branch, which is the west boundary line of a tract of land now owned by James Helms; thence up the center of said branch to a place from which a black oak and pecan brs. 5.81 deg. W. the oak 45 lks. the pecan 47 lks.; thence west to the place of beginning, containing nine acres, be the same more or less.

Tract No. 4.

Situated in Collin County, on the waters of Little Elm Creek about 15 miles N. W. from McKinney being a part of a survey made in the name of Geo. W. Estes; beginning at the S. E. cor. of said Estes survey a rock, the N. E. corner of the W. H. Rattan survey from said rock, an elm 14 in. in dia. mkd. X brs. N. 56 deg. E. 336; thence west 31.42 chs. a rock the S. W. corner of the Eastes survey; thence N. 27.13 chs. a bois'd arc stake, the S. W. corner of the Thos. Kendall 160 acre survey; thence E. with said line thereof of 27 ch. and 18 lks. to a post on said S. P. line; thence 27.13 chs. to the place of beginning, containing 85.25 acres.

10

Tract No. 5.

40 acres of land situated on the waters of Honey Creek in Collin County, being a part of that part of the 640 headright survey made in the name of Larkin Adamson, assignee of John Culwell that was

conveyed to David Best by Joseph Herne and wife and bounded as follows, towit:

Beginning in the center of a ravine and S. W. corner of the afore-said headright survey; thence east (va. 9 deg. 30") with the S. P. line thereof of 27 chs. and 18 lks. to a post on said S. P. line; thence north 16 chs. and 61 lks. to the center of a branch from which a spotted oak 12 in. in dia. mkd. X brs. 27 deg. E. 50 lks. elm same size and mark brs. S. 52 W. 69 lks.; thence up the center of said branch in a westerly direction to the N. B. line of said headright survey; thence south with said W. B. line 9 chs. and 89 lks. to the place of beginning.

Tract No. 6.

Situated in Collin County, in the State of Texas, on the waters of Little Elm Creek and bounded as follows, towit: Beginning at a bois'darc stake in the center of the road in John Herron survey; thence N. 45 lks. to the N. W. corner of the John Herron survey; thence E. 78.73 chs. with the south boundary line of the Moses Hubbard farm to the south E. corner of the Moses farm; thence S. 45 links to a rock in the center of the road; thence W. 78.73 chs. to the place of beginning and containing four acres of land, the same being part of the John Herron headright survey.

Tract No. 7.

Situated on the waters of the East Fork of Trinity River about 10½ miles N. 43 deg. W. from McKinney being a part of a survey of 550 acres of land in the name of Mary Howell Abst. No. 299, Beginning vrs. north of L. Routh's N. E. corner a stake the S. W. corner of said Mary Howell survey; thence north 950 vrs. a stake in the W. B. line of said survey; thence east 950 vrs. a stake; thence south 950 vrs. a stake in the S. B. line of said survey; thence west therewith 950 vrs. to the beginning containing one hundred and sixty acres of land more or less.

And the personal property thereunder is described more particularly as follows:

Common Property, Moneys, Notes, and Credits.

1 note on Mill & Elevator Co. Apr. 8, 1905, on demand	
of principal	832.10/100
Appraised value	903.98
Ten shares Capital stock Pilot Point Nat. Bank principal \$1,000.00 appraised value	1,200.00
10a	
Ninety shares capital stock Celina Mill & Elevator Co., principal \$9,000.00, appraised value.....	9,900.00
Receipt for \$200 on capital stock Celina Mill & Elevator principal \$200.00 July 5, 1904, appraised value	200.00

Receipt for \$1,000.00 on capital stock Celina Mill & Elevator Sept. 2, 1904, principal \$1,000.00, appraised value	1,000.00
45 shares D. C. Telephones Co. principal 450.00 appraised value	450.00

And plaintiff says the said John H. L. C. English has rented the said lands and converted to his own individual benefit and use, the use and occupation thereof which has been of the fair annual profit and value of the Six Thousand Dollars, and for this sum annually the plaintiffs are entitled to charge the said English herein, together with the earnings or in the interest thereon, from the date when he assumed possession thereof.

And plaintiff says that the plaintiffs, and each of them, is wholly without a remedy under the strict rules of the common law, and each of them can only obtain adequate relief in a court of conscience. Wherefore each complainant prays that an accounting be had between the said defendants, English Finley, Robinson and Foster, and each of them, concerning the rents, issues and profits and income of all of said real estate and personal property, and that the said instrument signed by Moses Hubbard and Mary Jane Hubbard, of date January 5, 1897, and every purported claim, judgment or right based thereupon be set aside and held for naught—that the supposed will signed by Mary Jane Hubbard and the clause 12 therein, dated February 5, 1914, be cancelled and set aside and annulled, and held of no effect—that the title in and to all the property in the foregoing bill of complaint be decreed to be, as also all the earnings and rentals thereof, the property of the said plaintiffs herein as heirs at law of the intestate property of Mary Jane Hubbard, deceased, and that the same be partitioned between the said heirs at law as their relative proportion therein be found and determined, which they pray may be done herein; and for such other and further relief as may appear to be just and equitable.

And each plaintiff prays for process of subpoena herein to the marshal of said court against each defendant named above to be served within this division.

ALBERT E. SUTTON.
RACHAEL E. KIRTLEY.
DELANA M. SUTTON.
ELIZABETH E. DAVIS.
GEORGE D. SUTTON.

HELEN M. MARSHALL,
IDA KRICHBAUM,
11 By ALLEN G. FISHER, *Complainants*.
ALLEN G. FISHER,
WILLIAM P. ROONEY,
Chadron, Nebraska,
Complainants' Solicitors.

—
McKinney, Texas.

UNITED STATES OF AMERICA,
State and District of Nebraska,
Sioux County, Chadron Division:

Deland M. Sutton, of lawful age, and Elizabeth E. Davis of lawful age, and George D. Sutton of lawful age, being first duly sworn according to law, each for himself and for herself and not for the other, on oath states; that he has read the foregoing bill of complaint and knows the contents thereof; and that each for himself and for herself on oath states that the facts and allegations contained therein are true.

And each acknowledges and states that each has employed as his, and as her attorney and solicitor herein, Allen G. Fisher, Esq., of Chadron, Nebraska, who is regularly licensed and admitted to the United States Supreme Court, and further affiants say not.

DELAND M. SUTTON.
 GEO. D. SUTTON.
 ELIZABETH E. DAVIS.

Subscribed in my presence, and sworn to before me this 24th day of July, 1915.

CYRUS D. WERTZ,
Clerk District Court, Sioux County, Nebraska.

UNITED STATES OF AMERICA,
State of Illinois, Southern District,
Southern Division, Jersey County:

Helen Marshall of lawful age, being first duly sworn according to law, on oath states that she has read the foregoing bill of complaint and the facts stated and allegations contained therein are true. And that she authorizes the acts of Allen G. Fisher, Esq., in this behalf. And further affiant says not.

HELEN MARSHALL.

Subscribed in my presence, and sworn to before me this 7th day of July 1915.

J. G. ERWIN,
Notary Public in and for said County.

My notarial commission expires April 17, 1917.

12 UNITED STATES OF AMERICA,
State and District of Wyoming,
County of Johnson:

Rachael E. Kirtley, of lawful age and Alebert E. Sutton, of lawful age, each being severally sworn according to law, each for himself and for herself, and not for the other on oath states, that each has read the within and foregoing bill of complaint and knows the contents thereof, and that the facts stated and allegations therein are true. And each states and acknowledges that she has and he has

employed as their solicitor and attorney herein, Allen G. Fisher, Esq., of Chadron, Nebraska, who is duly licensed by and admitted in the United States Supreme Court. And further affiants say not.

RACHAEL E. KIRTLEY.
ALBERT E. SUTTON.

Subscribed in my presence, and sworn to before me this 30th day of July, 1915.

GEO. J. HOLT,
Notary Public in and for said County.

My notarial Commission expires October 28, 1916.

UNITED STATES OF AMERICA,
State and District of Colorado,
County of Larimer:

Ida Krichbaum of lawful age, and being first duly sworn according to law on oath states that she has read and knows the contents of the foregoing bill of complaint, and that the facts stated and the allegations contained therein are true. And she authorizes the acts of Allen G. Fisher, Esq., in this behalf.

IDA KRICHBAUM.

Subscribed in my presence and sworn to before me this 3rd day of August, at my office in Larimer County, Colorado.

THOMAS WARREN,
Clerk of the District Court of the Eighth Ju-
dicial District of the State of Colorado in and
for Larimer County.

Endorsed: No. 47. In the United States District Court, in and for Eastern District of Texas, Sherman Division. Albert E. Sutton, Delana M. Sutton, Rachael E. Kirtley, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Krichbaum, plaintiffs, vs. John H. L. C. English, F. S. Finley, W. E. Foster, and District Trustees of Collin County of District No. 67, and the State of Texas, Cora D. Spencer and Robert L. Clayton, defendants. Bill in Equity. Allen G. Fisher, Chadron, Nebraska, Solicitor for plaintiffs William P. Roover, Attorney. Filed August 14, 1915, J. R. Blades, Clerk U. S. Court, by M. B. Oslin, deputy.

13 EXHIBIT "A" TO THE BILL OF COMPLAINT.

SUTTON
vs.
ENGLISH et al.

Estate of Mary Jane Hubbard, Deceased.

I, Mrs. Mary Jane Hubbard, of the County of Collin, and State of Texas, being of sound and disposing mind and memory, and being

desirous to settle my wordly affairs while I have strength to do so, do make this my last will and testament, hereby revoking all others heretofore by me made.

1st. I desire and direct that my body be buried in a decent and Christian like manner, suitable to my circumstances and condition in life.

2nd. I desire and direct that my just debts be paid out of my estate without delay, by my executor to be hereinafter appointed.

3rd. I give and bequeath to my beloved niece Cora D. Spencer my home in the town of Celina, same being Lots Nos. 13-14 and 15 in Block 17, to have and to hold unto her the said Cora D. Spencer, in fee simple forever.

4th. I give and bequeath to my friend Mrs. Sarah E. Neeley, three shares of bank stock in the First National Bank of Celina, to have and to hold the same together with the profits and income there unto her the said Sarah E. Neeley, in fee simple forever.

5th. I give and bequeath to my loving sister, Mrs. Rachael E. Kirtley my twenty shares of Bank Stock in the Celina State Bank to have and to hold the same unto her the said Rachael E. Kirtley, together with the profits and income thereof in fee simple forever.

6th. I give and bequeath to my loving niece Miss Mary Emma English one thousand (\$1,000.00) Dollars in land notes, to have and to hold the same to her the said Mary Emma English forever.

7th. I give and bequeath to my esteemed friend, Mrs. Sarah E. Neeley Five Hundred (\$500.00) Dollars in land notes, to have and to hold the same unto her, the said, Sarah E. Neely forever.

8th. I give and bequeath to my loving nephew Frank E. Spencer Fifteen Hundred (\$1,500.00) Dollars' worth of land notes, to have and to hold the same unto him, the said Frank E. Spencer, forever.

9th. I give and bequeath to my loving niece, Mrs. Alla Hubbard Five Hundred (\$500.00) Dollars, to have and to hold the same unto her, the said Alla Hubbard Farnsworth, forever.

10th. I give and bequeath to little Miss Lorine Neeley Five Hundred (\$500.00) Dollars, to have and to hold unto her, the said

14 Lorine Neeley forever. And it is my wish and I so direct that Sarah E. Neeley, mother of little Miss Lorine, have charge of said \$500.00 and manage same to the best interest of little Lorine, and pay the same to her, together with the income thereof, when she arrives at the age of twenty-one years or marries.

11th. I give and bequeath to my loving niece, Mrs. Cora D. Spencer all my household goods and furnishings, to have and to hold the same unto her, the said Cora D. Spencer, forever.

12th. I give and bequeath all the residue of my property that has not been bequeathed including my jewelry, to my loving niece, Mrs. Cora D. Spencer, to have and to hold to her in fee simple forever.

13th. And lastly, I do nominate and appoint R. L. Clayton to be the executor of this may last will and testament.

In testimony whereof, I have hereunto set my hand this the 5th day of Feb. A. D. 1914.

MARY JANE HUBBARD.

Signed, declared and published by Mrs. Mary Jane Hubbard, as her last will and testament, in the presence of us, the attesting witnesses, who have hereto subscribed our names in the presence of said Mrs. Mary Jane Hubbard, at her special instance and request, this the 5th day of Feb. A. D. 1914.

J. H. L. C. ENGLISH.
M. BUTTON.
J. T. BUCHANAN.

Filed 11th day of March, 1914, Pearl Strother, Clerk County Court, Collin County, Texas, by J. Ollie Smith, deputy.

THE STATE OF TEXAS,
County of Collin:

In the name of God: Amen.

We, Moses Hubbard and Mary Jane Hubbard, of Collin County being of sound mind and disposing memory mindful of the uncertainty of life, and the certainty of death, wishing to dispose of the effects, it has pleased Almighty God to bless us with while we have strength of mind and body so to do, do make publish and declare this to be the last will and testament of us and each of us, hereby revoking all others by us made and we each direct that as each of us die this instrument shall be probated as the will of such deceased person.

Item 1st. We commend our spirits to God who gave them and our bodies to the dust whence they came directing our executors in this will to give us each decent burial and to erect for us a monument commensurate and suitable to our means and station in life.

Item 2nd. It is our desire and that of each of us, that, as each of us dies all the property then owned by us shall descend and vest in the following named persons and their successors in this trust, to wit: J. H. L. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the superintendent of Public Instruction for Collin County who shall take and hold all the property real, personal and mixed owned by us at the death of either of us, for the purposes, uses and trusts and as hereinafter directed and vacancies in whose number shall be filled as herein directed.

Item 3rd. Upon the death of either of us the trustees shall receive the rents, revenues and profits arising from all of said property, and shall lend all moneys having same well secured, or invest same in interest bearing bonds, rent the lands. One half the net proceeds shall be paid to any person and in any manner and for any purpose the survivor may direct. The other half shall be used and paid out in the same manner and for the same purpose as the rents and revenues of the property are herein directed to be paid and appropriated after the death of both of us but the survivor has the right during lifetime to determine the manner of expenditures. That is

whether it shall be used in employment of teachers, erection of building, purchases of apparatus or other germane uses etc.

Item 4th. Upon the death of both of us the trustees herein provided for shall take and hold all the property herein bequeathed which shall constitute and be divided into two funds, one of which shall be a permanent fund and which shall not be lessened or diminished in any manner or for any purpose. The other fund shall be the available fund and may be expended, used and applied as directed herein. The permanent fund under this instrument shall consist of all of our real estate, stocks, notes and cash and such additions as under the provisions of this will, may from time to time be added thereto. The additions to the permanent fund shall come from the rents, revenues, profits and interest arising from the permanent fund, and shall in no year be less than one third, but on an average shall be one half of such rents, revenues, profits and interests, and the balance of the rents, revenues, profits and interest shall be set aside and used as an available fund.

Item 5th. Believing that we have the love of God in our hearts for the manifold blessings he has bestowed upon us and desiring to add to the happiness and improvement of our neighbors we have founded an institution for increase and diffusion of knowledge which we have named "Alla" and which shall remain permanently located on the same survey on which it is located, to wit: Wade H. Rattan,

and it is our desire that the trustees herein provided for shall use the available fund herein provided for in the employment of teachers, erection of proper and necessary buildings, the purchase of apparatus and other germane uses, and it is our desire that at this school or institution of learning all children whose parents are Caucasian and of the white race and who are over the age of six and under the age of twenty one, shall be admitted free of tuition in case more apply than the funds on hand justify then the trustees in determining who shall be admitted are requested to give preference to worthy students who have been in attendance before residing in the school district or adjacent thereto. The term "Germane uses" is intended to receive a liberal construction and to authorize the use of all means deemed proper by the trustees for diffusion of knowledge but we do not desire a sectarian school taught The Holy Bible may be used and we pray may be the rule and guide of both instructors and pupil.

Item 6th. The trustees shall have no power to sell or alienate the real estate devised herein, but it shall be preserved and its rents, revenues be applied for the charitable uses, but should it be determined by the judgment of the Court of competent jurisdiction after a bona fide trial in which nothing must be agreed upon that this litigation is invalid then and only in that event we direct the trustees to sell said lands and hold the proceeds as part of the permanent fund it is however our wish, That the lands shall never be sold if it be legal to hold them as here provided.

Item 7th. Confiding in the honor and integrity of J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, and F. S. Finley, and

the person who may be Superintendent of Public Instruction for Collin County, Texas, we appoint trustees of this fund and executors of each of our will.

Item 8th. Should we survive any of the executors or trustees, the majority of those living may fill out by election their number to complete the number contemplated by this instrument which is five (5) and in case of death or refusal to act, of any of the number at any time, either at our death or at any time, the majority may fill vacancies but the Trustees must be residents of Collin County, Texas, it being our intention to create a perpetual body to this end the Trustees may if advised that it would *be* better advance the purposes herein intended incorporate under the name of "Alla" no stock shall be issued.

17 Item 9th. It is our desire that the Trustees herein provided for, towit: J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the Superintendent of Public Instruction for Collin County, Texas, be not required to give bond, it is further our desire that no one be elected or act as Trustee who is not a resident of Collin County, Texas, and that a change of residence from Collin County, Texas, shall be cause for removal from Trusteeship and the proper court is authorized and requested to require bond of subsequent Trustees, if deemed best for preservation of fund.

Item 10th. The Trustees shall have no power ever to create any debt and shall make no purchases or contract a liability beyond a present liability to pay cash.

Item 11th. It is our desire that no further action be had in the County in reference to the settlement of our estates than the probating of this will of each of us, the return of an inventory and appraisalment and list of claims.

Witness our hands this 5th day of January, 1897, in the presence of S. T. Cunningham, J. E. Kerr, Francis C. B. Fields, W. A. Gossett and W. E. Francis whom we request to sign as Attesting witnesses to this our last will and testament.

MOSES HUBBARD.

MARY JANE HUBBARD.

S. T. CUNNINGHAM.

J. E. KERR.

C. E. FRANCIS.

C. B. FEILDS.

W. A. GOSSETT.

W. E. FRANCIS.

THE STATE OF TEXAS,
County of Collin:

The foregoing instrument was signed, published and declared in our presence by Moses Hubbard to be his last will and testament and we at his request and in his presence and in the presence of each

other signed the same as attesting witnesses each of us being over the age of 21 years.

S. T. CUNNINGHAM.

J. E. KERR.

C. E. FRANCIS.

C. B. FIELDS.

W. A. GOSSETT.

W. E. FRANCIS.

Endorsed: In the District Court of the United States of America, No. 47, held in and for the Eastern District of Texas, Sherman Division. Albert E. Sutton et al., complainants, vs. John H. L. C. English et al., defendants. Exhibit to bill of plaintiffs. Filed August 14, 1915. J. R. Blades, Clerk United States Court, by M. B. Oslin, deputy.

18 THE STATE OF TEXAS,
County of Collin:

In the County Court of Collin County, Texas, July Term, A. D. 1906.

To the Honorable County Court of Collin County:

Now comes your petitioners, J. H. L. C. English, B. F. Spencer, and F. S. Finney, J. T. Robinson, W. L. Yarbrough and would respectfully show to your Hon. Court that Moses Hubbard departed this life in Collin County, Texas, on or about the 20th day of May, 1906, that prior to his death the said Moses Hubbard, had resided in Collin County, for the space and period of about 40 years; that he owned property situated in Collin County, Texas, consisting of lands and personal property of the value of about sixty thousand dollars. Petitioners would further show that the said Moses Hubbard left a will which is herewith filed in which he nominated J. H. L. C. English, B. F. Spencer, Dan F. English, F. S. Finley and the superintendent of Public Instruction as executors of his will; that he provided in his will that the said executors should be residents of Collin County, Texas; that the said Dan P. English has removed from Collin County and the said will provided that the majority of the executors should have the power to fill vacancies; that said executors have nominated and appointed J. T. Robinson, in the place of Dan P. English.

These petitioners would further show to the court that it was the intent and purpose of the said Moses Hubbard and of the said Mary Jane Hubbard his wife, who also joined in the execution of the will that they should make a joint will which should be probated at the death of each of them and that by the terms of the will and the intent of the will the persons' property on hand at the death of either of them should vest in the survivor and that upon the death of the survivor the personal property then on hand should be imposed with the trust created by the will. That a question having arisen among them these executors pray that the will be now so construed and that the Court in the order probating the will construe

the same and give them directions as to the disposal of the personal property, and in the execution of their trust.

Your petitioners therefore pray that all proper notices be given that upon hearing said will be probated, and that the court construe the will that no bond be required of them, as the will exempts them from bond and that no further action be had except to construe, return and inventory and appraisement and list of claims and probate said will.

ABERNATHY & ABERNATHY,
Attorneys for Petitioners.

Filed June 12, 1906. W. M. Shirley, Clerk County Court,
19 Collin County, Texas, by G. E. Strother, Deputy.

Estate of MOSES HUBBARD, Dec'd. J. H. L. C. English et al., Ex'rs.

Nov. 2, 1906.

Now, on this day came on to be heard the inventory and appraisement in the estate of Moses Hubbard, dec'd, filed herein on the 25th day of Sept., 1906, and it appearing to the court that the same is a just, full, fair and complete inventory of all the property belonging to the said estate, it is therefore ordered, adjudged and decreed by the Court that the same be, and it is here now in all things approved and ordered to be recorded.

THE STATE OF TEXAS,
County of Collin:

In the County Court of said County, October Term, 1906.

In the matter of the estate of Moses Hubbard, deceased, the following is a full and true inventory and appraisement of all the estate both real and personal of ——— deceased, which has come to the possession or knowledge of the undersigned ——— of said estate.

1.	160	acres	Mary Howell survey.....	\$9,600.00
2.	640	acres	Wade H. Rattan Survey.....	32,000.00
3.	4	acres	John M. Herron ".....	200.00
4.	75 1/4	acres	G. W. Estes ".....	2,250.00
5.	54 3/4	acres	G. W. Estes and W. W. Shawver survey	2,200.00
6.	40	acres	Jno. Culwell Survey.....	800.00
7.	9	acres	Thomps Helms ".....	360.00

Personal Property, Common Property.

Household and kitchen furniture.....	400.00
One cow and one calf.....	20.00

Common Property, Moneys, Notes, and Credits.

1 note on Mill & Elevator Co. Apr. 8, 1905 on demand 6% principal 832 10/100 appraised value.....	906.98
Ten shares capital stock Pilot Point Nat. Bank principal 1,000.00 appraised value.....	1,200.00
Ninety shares capital stock Celina Mill & elevator, prin- cipal 9,000.00 appraised value.....	9,900.00
Receipt for \$200 on capital stock Celina Mill & Elevator principal \$200.00, July 5, 1904, appraised value....	200.00
Rec-ipt for \$1,000 on capital stock Celina Mill & Ele- vator Sept. 2, 1904, principal 1,000.00, apprais-d value	1,000.00
45 shares D. C. Telephone Co. principal 450.00 ap- praised value	450.00
	<hr/>
	\$61,486.98

20

Common Property.

Dated at Celina, this 24th day of September, 1906.

J. H. L. C. ENGLISH.

We, the undersigned appraisers do hereby certify that pursuant to a warrant under an order of your court to us directed we have appraised all the property described and mentioned in the above inventory which has been to us exhibited, setting down opposite to each item in said inventory in figures the values thereof in money as by us determined. Dated this 24th day of September, 1906.

A. COLEMAN,

J. W. KERR,

S. J. LOUIS,

Appraisers.

Subscribed and sworn to this 24th day of Sept. A. D., 1906.

[L. s.]

J. T. BUCHANAN,

N. P. Collin County, Texas.

THE STATE OF TEXAS,

County of Grayson:

J. H. L. C. English, being duly sworn on oath says that he is the executor of the estate of Moses Hubbard late of said County deceased, and that the foregoing is a full and complete inventory and list of all the property and claims belonging to the estate of the said Moses Hubbard, deceased, which have come to *my* possession or knowledge and that upon diligent inquiry he has not been able to discover any other property belonging to the estate of said deceased.

J. H. L. C. ENGLISH.

Sworn to and subscribed before me this 24th day of Sept. 1906.

[L. S.]

J. T. BUCHANAN,
Collin County, Texas.

Filed Sept. 25, 1906, W. M. Shirley, clerk, by G. E. Strother, deputy.

THE STATE OF TEXAS,
County of Collin:

I, W. L. Keen, Clerk of the County Court in and for Collin County, Texas, do hereby certify that the above and foregoing is a full true and correct copy of petition of J. H. L. C. English et al, for the probate of the last will and testament of Moses Hubbard, deceased, as the same appears of record in Vol. 1, page 455, and order approving Inventory and Appraisement and the Inventory and Appraisement as the same appear of record in Vol. 5, page 104, probate Minutes of the County Court of Collin County, Texas.

Witness my hand and the seal of said court at office in the City of McKinney, this 31st day of May, A. D., 1916.

W. L. KEEN,
Clerk County Court, Collin Co., Texas.
By J. OLLIE SMITH,
Deputy.

Endorsed: No. 47. In U. S. District Court, Eastern District of Texas, Sherman Division. Sutton et al., vs, English et al. Plaintiff's Exhibit to Bill. Filed June 1st, 1916. J. R. Blades, clerk.

21 In the County Court of Collin County, Texas, April Term, 1914.

No. 2476.

Estate of Mary Jane Hubbard, Deceased.

May 25, 1914.

On this day came on to be considered the Bond and Oath of Robt. L. Clayton, executor of the estate of Mary Jane Hubbard, deceased, and the court having considered the same is of the opinion that it is a good and solvent bond and for the amount required by law, and the oath is in due form of law. It is therefore ordered by the Court that said Bond and Oath be and are here now approved and ordered recorded in the Minutes of this Court.

No. 2476.

In Re the Estate of Mrs. Mary Jane Hubbard, Deceased.

THE STATE OF TEXAS,
County of Collin:

Know all men by these presents:

That we, R. L. Clayton, as principal, and J. H. L. C. English, and Bud Moore, as sureties, are held and firmly bound to pay to the County Judge, of said County of Collin, and his successors in office the sum of twenty four thousand dollars, conditioned that the above bound R. L. Clayton who, has been appointed executor of the estate of said deceased will faithfully discharge the duties of executor of said deceased, according to law.

Witness our hands this 31st day of May, A. D., 1914.

ROBT. L. CLAYTON, *Principal.*

J. H. L. C. ENGLISH, *Surety.*

BUD MOORE. X His Mark,
Surety.

Attest:

M. BUTTON.

LEE B. NEWSOM.

Examined and approved this 25th day of May, A. D., 1914,

H. L. DAVIS,

County Judge, Collin County, Texas.

Oath.

I do solemnly swear that I will faithfully discharge the duties of executor of said deceased, according to law.

ROBT. L. CLAYTON.

Subscribed and sworn to before me this 21st day of May A. D., 1914.

[L. S.]

J. T. BUCHANAN.

Notary Public, Collin County, Texas.

Filed 25th day of May, A. D., 1914, Pearl Strother, Clerk County Court, Collin County, Texas, by J. Ollie Smith, deputy.

22 In the County Court of Collin County, Texas, April Term,
1914.

No. 2476.

Estate of Mary Jane Hubbard, Deceased.

May 25, 1914.

This day came on to be considered the report of the inventory, appraisalment and list of claims of the estate of Mary Jane Hub-

bard, deceased, made by J. H. L. C. English, J. T. Buchanan and M. Button, who have heretofore been appointed to appraise said estate, and the Court having examined said *said* report, it is ordered by the Court that the same be and it is hereby in all respects approved.

In County Court, Collin County, Texas.

No. 2476.

Estate of Mary Jane Hubbard, Deceased.

R. L. Clayton, Ex'r.

Inventory and appraisement of the *Estate* of Mrs. Mary Jane Hubbard, deceased, produced before the undersigned appraisers, on the 20th day of May, A. D., 1914, by R. L. Clayton, Ex'r of the estate of said Mrs. Mary Jane Hubbard, deceased.

Separate property of said deceased.	Appraised value.
20 shares of stock in Celina State Bank.....	2,694.00
3 " " " " 1st State Bank of Celina.....	435.69
25 " " " " S. W. Surety Co.....	625.00
1 house and lot in Celina, Texas, lots 13-14 & 15 Bk. 17..	3,000.00
Household goods, furniture, etc.....	500.00
One fire proof safe.....	15.00
Cash in Celina State Bank.....	548.50
Claim against J. H. L. C. English for.....	1,250.89
as trustee.	
Community Property.	

We, the undersigned appraisers, do solemnly swear that the foregoing is a full and fair appraisement of the estate of M. J. Hubbard, deceased, produced before us by Robt. L. Clayton, Ex'r.

J. H. L. C. ENGLISH,
J. T. BUCHANAN,
M. BUTTON,

Appraisers.

Sworn and subscribed before me this 20th day of May, A. D., 1914.

[L. s.]

J. E. LIPSCOMB,
Notary Public in and for
Collin Co., Texas.

List of All Claims Due and Owning.

Community Property.

List of claims.	Separate property.	Face note.	Due.	Rate.
T. E. Pwoell.....	1 V. L. Note.....	\$2,925.00	1-1-1919	8%
Mrs. Lizzie and Rhea Gossett.....	1 promissory note..	700.00	11-15-12	8% Interest to be col- lected to date of death.
W. T. Thorp.....	1 V. L. note (No. 3)	500.00	12-1-1912	8% int. pd. to 12-1-13.
W. T. Thorp.....	1 V. L. note (No. 4)	500.00	12-1-1913	8% int. pd. to 12-1-13.
S. M. Scroggins.....	1 V. L. note (No. 3)	300.00	11-1-1912	8% int. pd. to 12-1-13.
G. M. Scroggins.....	1 V. L. note (No. 4)	400.00	11-1-1913	8% int. pd. to 12-1-1913.
R. E. L. Miller.....	1 V. L. note (No. 1)	750.00	8-1-1913	8% on or be- fore.
R. E. Miller.....	1 V. L. note (No. 2)	750.00	8-1-1915	8% on or be- fore.
D. R. Kerr.....	1 V. L. note (No. —)	300.00	12-1-1911	8% int. pd. to 12-1-1913.

I do solemnly swear that the foregoing inventory and list is a full and complete inventory of the property and claims of M. J. Hubbard deceased, that have come to my knowledge.

ROBT. L. CLAYTON, *Ex'r.*

Sworn to and subscribed before me, this 20th day of May, A. D. 1914.

J. E. LIPSCOMB,

Notary Public in and for Collin County, Texas.

Filed 25th day of May, 1914, Pearl Strother, Clerk, by J. Ollie Smith, deputy.

THE STATE OF TEXAS,

County of Collin:

I, W. L. Keen, Clerk of the County Court, Collin County, Texas, do hereby certify that the above and foregoing is a full, true and correct copy of order approving bond and oath and inventory and appraisement, of the estate of Mary Jane Hubbard, deceased, and the bond and oath and inventory and appraisement of said estate as the same appear of record in Vol. 11, page 410-411 of the probate Minutes of the County Court, Collin County, Texas. Witness my hand and the seal of said court, this 31st day of May, A. D., 1916.

W. L. KEEN,

Clerk County Court, Collin County, Texas,

By J. OLLIE SMITH, *Deputy.*

Endorsed: No. 47. In United States District Court, Eastern District of Texas, Sherman Division. Sutton et al. vs. English et al. Pl'tiffs' Exhibit to Bill. Filed June 1, 1916. J. R. Blades, Clerk.

24 STATE OF TEXAS,
 County of Collin:

In the District Court of Collin County, Texas, February Term, 1913.

To the Honorable J. M. Pearson, Judge of said Court:

Now comes J. H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, Superintendent of public instruction of Collin County, Texas, trustees of Alla School Fund, hereinafter styled plaintiffs, complaining of the Christian University and Mary Jane Hubbard, hereinafter styled defendant, and represent:

That plaintiffs all reside in Collin County, Texas, and sue in their fiduciary capacity as trustee of Alla and Alla fund.

They represent that Alla is an exclusive, educational and charitable institution, and is unincorporated; that the defendant, the Texas Christian University is a corporation, duly incorporated under the laws of the State of Texas, having its principal office and place of business at Ft. Worth, Texas, Tarrant County; and that F. D. Kershner of Tarrant County, Texas, is its President.

That the defendant, Mary Jane Hubbard, resides in Collin County, Texas.

That heretofore, towit: on the 20th day of June, 1912, the plaintiffs were in possession of the following described property, towit:

No. 1.

Situated in Collin County, Texas, on the divide between Honey Creek and Little Elm Creek, the same being the 54¾ acres deeded to J. F. Fleming and Sarah Fleming and C. P. Fleming and M. J. Fleming by Marion A. Maples and wife by deed dated July 24th, A. D. 1899, and recorded in Book 93, pages 324-5-6 and 7 Collin County Records of Deeds. Beginning at the south west corner of a 40 acre tract conveyed to R. H. Tillerson by J. R. Geer and wife, M. N. Geer. . . . Thence west 30.28 chs. to a rock the northwest corner of the Queen survey . . . thence north 11.50 chs. to a bois'darc stake on the north line of the G. W. Estes 74 acre survey . . . thence east 9.33 chs. to the north east corner of said Estes survey . . . thence north 9.50 chs. a rock . . . thence east 20.95 chs. to the northwest corner of said Tillerson 40 acre tract . . . thence south 21 chs. to place of beginning, containing 54¾ acres of land or more or less 24.1 acres in the W. B. Tucker 19.9 acre in the W. W. Shawver and 10¾ acres in the G. W. Estes surveys.

No. 2.

Situated in said County on the waters of Little Elm about 14

25 miles N. 40 W. from McKinney being the whole of a survey of 640 acres in the name of the heirs of W. H. Rattan, Abst. No. 609 and Beginning at S. M. Boyd's S. W. corner, a post from which a cluster of Hackberrys brs. N. 6 E. 231 vrs. . . . thence west with J. M. Harrins N. line 1874 vrs. a post from which from which a cluster of Hack-errys brs. N. 6 E. 231 vrs. . . . thence north 1,644 vrs. a post from which a willow brs. N. 73½ E. 243 vrs. . . . thence east 2,613 vrs. a post on Sam'l Queen's west line from which an elm brs. N. 46 E. 80 vrs. . . . thence south 718 vrs. said Queen's S. W. corner . . . thence west 738 vrs. said Boyd's N. W. corner . . . thence south 927 vrs. to the beginning, bearings mkd. X, containing 640 acres more or less.

No. 3.

Situated on the waters of Honey Creek in Collin County and being a part of the Headright survey and being a part of the Thompson Helms and bounded as follows: Beginning in the center of Honey Creek a short distance above the Lacy Spring a point from which a cottonwood mkd. X brs. N. 4½ deg. west 44 links, also a double black oak brs. south 64½ east 62 links . . . thence down the center of Honey Creek to the Mouth of a certain branch, which is the west boundary line of a tract of land now owned by James Helms . . . thence up the center of said branch to a place from which a black oak and pecan brs. 5.81 deg. W. the oak 45 lks. the pecan 47 lks . . . thence west to the place of beginning, containing nine acres, be the same more or less.

No. 4.

Situated in Collin County on the waters of Little Elm Creek about 15 miles N. W. from McKinney being part of a survey made in the name of Geo. W. Eastes Beginning at the S. E. cor. of said Eastes survey a rock, the N. E. corner of the W. H. Rattan survey from said rock, and elm 14 in. in dia. mkd. X brs. N. 56 deg. E. 33½ lks. . . . thence west 31.42 chs. a rock the S. W. corner of the Eastes survey . . . thence N. 27.13 chs. a bois'dacr stake, the S. W. corner of the Thos. Kendall 160 acre survey . . . thence E. with the S line of said Kendall survey 31.42 chs. a bois'dacr stake . . . thence S. 27.13 chs. to the place of beginning, containing 85.25 acres.

No. 5.

40 acres of land situated on the waters of Honey Creek in Collin County, being a part of that part of the 640 headright survey made in the name of Larkin Adamson, assignee of John Culwell that was conveyed to David Best by Joseph Hearne and wife and bounded as follows, towit:

26 Beginning in the center of a ravine and S. W. corner of the aforesaid headright survey . . . thence east (va. 9 deg. .

30") with the S. P. line thereof of 27 chs. and 18 lks. to a post on said S. P. line . . . thence north 16 chs. and 61 lks to the center of a branch from which a spotted oak 12 in. in dia. mkd. X brs. S. 27 deg. E. 50 lks., elm same size and mark brs. S. 52 W. 69 lks. . . . thence up the center of said branch in a westerly direction to the N. B. line of said headright survey . . . thence south with said W. B. line 9 chs. and 89 lks. to the place of beginning.

No. 6.

Situated on the waters of East Fork of Trinity River about 10½ miles N. 46 deg. from McKinney being a part of a survey of 550 acres of land in the name of Mary Howell, Abstract No. 299. Beginning — yrs. north of L. Routh's N. E. Corner a stake the S. W. corner of said Mary Howell survey . . . thence north 950 yrs. a stake in the W. B. line of said survey . . . thence east 950 yrs. a stake . . . thence south 950 yrs. a stake in the S. B. line of said survey . . . thence west therewith 950 yrs. to the beginning containing one hundred and sixty acres of land more or less.

That plaintiffs in their fiduciary capacity as hereinbefore stated, were the owners of all of said property in fee simple; that the defendants unlawfully entered upon and disposed of plaintiffs of such premises on, to wit: the 20th day of June, 1912, and withholds from them the possession thereof.

That the defendant, the Texas Christian University, is asserting some kind of a claim to the property which casts a cloud upon plaintiff's title. Plaintiffs here expressly disclaim any intention of pleading their title to said property, but one link in the chain of title is a joint and mutual will of Moses Hubbard and Mary Jane Hubbard; that Moses Hubbard departed this life about May, 1906; that said will was duly filed and probated about June, 1906, a copy of which is hereto attached and marked "Exhibit A." That said joint will was duly executed by the said Moses Hubbard and his wife Mary Jane Hubbard, defendants herein, under a compact, agreement and contract mutually binding upon each, and the same, after the death of the said Moses Hubbard and the probating of said will, was irrevocable by either Moses Hubbard or Mary Jane Hubbard.

That under the premises of said will the said Mary Jane Hubbard received rights, emoluments and privileges which she would not have had but for said will; that the said Mary Jane Hubbard accepted under said will and has at all times since the probating thereof accepted and exercised those rights, privileges and emoluments, 27 and by reason of the premises said will is irrevocable by the said Mary Jane Hubbard.

But if mistaken in the foregoing allegation then by reason of the premises and by reason of the fact that said will was irrevocable a trust was created in behalf of the plaintiffs herein for the use and enjoyments of said premises, subject to the limitation, conditions and restrictions mentioned in the certified copy of said will hereto attached.

Wherefore plaintiffs pray that citation issue requiring the defend-

ants to appear and answer herein and that upon final hearing plaintiffs have judgment for the title to said premises herein sued for, and that the cloud be removed from their title by reason of claims of plaintiffs herein and that the trust be declared in the plaintiffs subject to the limitations and restrictions mentioned in said will.

Plaintiffs further pray for all general, special and equitable relief.

G. R. SMITH,
W. R. ABERNATHY,
Attorneys for Plaintiffs.

"EXHIBIT A."

THE STATE OF TEXAS,
County of Collin:

In the name of God: Amen.

We, Moses Hubbard and Mary Jane Hubbard of Collin County being of sound mind and disposing memory mindful, of the uncertainty of life and the certainty of death, wishing to dispose of the effects it has pleased almighty God to bless us with while we have strength of mind and body so to do, do make, publish and declare this to be the last will and testament of us, and of each of us, hereby revoking all others by us made and we each direct that as each of us die this instrument shall be probated as the will of such deceased person.

Item 1st. We commend our spirits to God who gave them and our bodies to the dust whence they came, directing our executors in this will to give us each decent burial, and to erect for us a monument commensurate and suitable to our means and station in life.

Item 2nd. It is our desire and that of each of us, that, as each of us dies all the property then owned by us shall descend and vest in the following named persons and their successors in this trust, to wit: J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the superintendent of public instruction for Collin County who shall take and hold all the property real, personal and
28 mixed owned by us at the death of either of us, for the purposes used and trusts and as herein after directed and vacancies in whose number shall be filled as herein directed.

Item 3rd. Upon the death of either of us the trustees shall receive the rents, revenues and profits arising from all of said property, and shall lend all moneys having same well secured, or invest same in interest bearing bonds, rent the land, one half of the net proceeds shall be paid to any person and in any manner and for any purpose the survivor may direct. The other half shall be used and paid out in same manner and for the same purpose as the rents and revenues of the property are herein directed to be paid and appropriated after the death of both of us but the survivor has the right during *the* lifetime to determine the specific manner of expenditure. That is whether it shall be used in employment of teachers, erection of building, purchase of apparatus or other germane uses, etc.

Item 4th. Upon the death of both of us the Trustees herein pro-

vided for shall take and hold all the property herein bequeathed which shall constitute and be divided into two funds, one of which shall be a permanent fund and which shall not be lessened or diminished in any manner or for any purposes. The other fund shall be the available fund and may be expended used and applied as directed herein. The permanent fund under this instrument shall consist of all our real estate, stocks, notes and cash and such additions as under the provisions of this will may from time to time be added thereto. The additions to the permanent fund shall come from the rents, revenues, profits and interests arising from the permanent fund, and shall in no year be less than one third, but on an average shall be one half of such rents, revenues, profits and interests and the balance of the rents, revenues, profits and interest shall be set aside and used as an available fund.

Item 5th. Believing that we have the love of God in our hearts for the manifold blessings he has bestowed upon us and desiring to add to the happiness and improvement of our neighbors we have founded an institution for increase and diffusion of knowledge which we have named "Alla" and which shall remain permanently located on the same survey on which it is located, to wit, — Wade H. Rattan, and it is our desire that the trustees herein provided for shall use the available fund herein provided for in the employment of teachers,

erection of proper and necessary buildings, the purchase of apparatus and other germane uses. And it is our desire that at this school or institution of learning all children whose parents are Caucasian and of white race and who are over the age of six and under the age of twenty one, shall be admitted free of tuition but in case more apply than the funds on hand will justify, then the Trustees in determining who shall be admitted are requested to give preference to worthy students who have been in attendance before and those residing in the school district or adjacent thereto.

The term "german-uses" is intended to receive a liberal construction and to authorize the use of all means deemed proper by the trustees for diffusion of knowledge but we do not desire a Sectarian school taught. The Holy Bible may be used and we pray may be the rule and guide for both instructor and pupil.

Item 6th. The Trustees shall have no power to sell or alienate the real estate devised herein but it shall be preserved and its rents, revenues be applied for the charitable uses, but should it be determined by the judgment of a court of competent jurisdiction after a bona fide trial in which nothing must be agreed upon that this limitation is invalid then and only in that event we direct the trustees to sell said land and hold the proceeds as part of the permanent fund, it is however our wish: That the lands shall never be sold if it be legal to hold them as provided.

Item 7th. Confiding in the honor and integrity of J. H. L. C. English, Dr. B. F. Spencer, and F. S. Finley, and the person who may be Superintendent of Public Instruction for Collin County, Texas, we appoint — trustees of this fund and executors of each of our wills.

Item 8th. Should we survive any of the executors or trustees the

majority of those living may fill out by election their number to complete the number contemplated by this instrument, which is five (5) and in case of the death or refusal to act of any of the number at any time either at our death or at any time the majority may fill vacancies but the trustees must be residents of Collin County, Texas, it being our intention to create a perpetual body to this end the trustees may if advised that it would better advance the purposes herein intended incorporated under the name of "Alla" No stock shall be issued.

Item 9th. It is our desire that the trustees herein provided for to wit: J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the Superintendent of Public Instruction for Collin County, Texas, be not required to give bond, it is further our desire that no one be elected or act as trustee who is not a resident of

30 Collin County, Texas, and that a change of residence from Collin County, Texas, shall be cause for removal from trusteeship; and the proper court is authorized and requested to require bond of subsequent trustees, if deemed best for preservation of fund.

Item 10th. The trustees shall have no power to create any debt and shall make no purchase or contract a liability beyond a present ability to pay cash.

Item 11th. It is our desire that no further action be had in the County in reference to the settlement of our estates than the probating this the will of each of us, the return of an inventory and appraisement and list of claims.

Witness our hands this the 5th day of January, 1897, in the presence of S. T. Cunningham, J. E. Kerr, C. E. Francis, C. B. Fields, W. A. Gossett and W. E. Francis, whom we request to sign as attesting witnesses to this our last will and testament.

MOSES HUBBARD.

MARY JANE HUBBARD.

S. T. CUNNINGHAM.

J. E. KERR.

C. E. FRANCIS.

W. A. GOSSETT.

W. E. FRANCIS.

Witnesses.

THE STATE OF TEXAS,

County of Collin:

The foregoing instrument was signed, published and declared in our presence by Moses Hubbard to be his last will and testament and we at his request and in his presence and in the presence of each other signed the same as attesting witnesses each of us being over the age of 21 years.

S. T. CUNNINGHAM.

J. E. KERR.

C. E. FRANCIS.

C. B. FIELDS.

W. A. GOSSETT.

W. E. FRANCIS.

THE STATE OF TEXAS,
County of Collin:

The foregoing instrument was signed, published and declared in our presence by Mary Jane Hubbard to be her last will and testament and we at her request and in her presence and in the presence of each other signed the same as attesting witnesses, each of us being over the age of 21 years.

S. T. CUNNINGHAM.
J. E. KERR.
C. E. FRANCIS.
C. B. FIELDS.
W. A. GOSSETT.
W. E. FRANCIS.

31 THE STATE OF TEXAS,
County of Collin:

I, A. S. Wheatley, Clerk in and for the said County and State, do hereby certify the above and foregoing to be a true and correct copy of the plaintiff's Original Petition in cause No. 7072, wherein, J. H. L. C. English et al, trustees are plaintiffs, and Texas Christian University et al. are defendants, which said suit was filed in said court on 11th day of January, A. D., 1913, as the same now appears on file in my office.

Witness my hand and official seal of office at office this 28th day of June, A. D., 1915.

A. S. WHEATLEY,
Clerk District Court, Collin County, Texas.
By C. L. SEARS, *Deputy.*

Endorsed: In County Court: No. 7072. J. H. L. C. English et al trustees vs. Texas Christian University et al. Plaintiffs' Original petition. This action is brought as well to try the title as for damages. Filed Jan. 11, 1913, A. S. Wheatley, Clerk, District Court, Collin County, Texas.

Endorsed: No. 47. In United States District Court, Eastern District of Texas, Sherman Division. Sutton et al. vs. English et al. Plaintiffs' exhibit to Bill. Filed June 1, 1916. J. R. Blades, Clerk.

32 In the District Court of the United States Held in and for the Eastern District of Texas, at Sherman.

No. 47. In Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH et al.

To the Honorable Gordon Russell, Judge of the District Court of the United States for the Eastern District of Texas:

Now comes the defendants, John H. L. C. English, F. S. Finley, J. T. Robinson, W. E. Foster and District Trustees of District No. 67 in Collin County, Texas, and represent and show to the court:

First.

That there is a misjoinder of causes of action as set forth in plaintiffs' bill in the following respects towit:

Said bill shows upon its face that the same is a bill to contest the will of Moses Hubbard dated January 5th, 1897 and by virtue of which John H. L. C. English, F. S. Finley, J. T. Robinson, and W. E. Foster, as trustees, and District Trustees of District No. 67, hold the lands described in plaintiffs' petition and the rents and revenues derived therefrom, less the amounts paid Mary Jane Hubbard in her lifetime for the Alla School, and the defendants Cora D. Spencer and Robert L. Clayton have no interest whatever in that subject of litigation, and that the liability is not one asserted against Cora D. Spencer and Robert L. Clayton, but against said defendants trustees, and District solely, and that said bill is also brought for the purpose of annulling and setting aside the probate of the will of Mary Jane Hubbard, under and by virtue of which the defendant, Cora D. Spencer as residuary legatee became the owner of certain real estate and personal property, and that the defendants' trustees and District hereinbefore named, are in no way liable on any feature of the bill.

That the rights and interests of Cora D. Spencer can in no manner be effected by the setting aside and annulling the probate of the bill of Moses Hubbard, and the rights and liabilities of said defendants, as trustees and said district, can in no manner be effected by setting aside and annulling the probate of the will of Moses Hubbard, and the rights and liabilities of said defendants, as trustees and said District, can in no manner be effected by setting aside the probate will of Mary Jane Hubbard, deceased, wherein Cora D. Spencer is legatee.

33 Wherefore said defendants move the court to dismiss this action for misjoinder of causes.

GEO. R. SMITH,
W. R. ABERNATHY,
CECIL H. SMITH,
Attorneys for said Defendants.

Second.

Said defendants herein move the court to dismiss this cause of action for misjoinder of parties defendant, it appearing from the face of the bill that the defendants' trustees and said district, herein-above named, have no interest in the probating or the annulling of the will of the said Mary Jane Hubbard as sought by said bill, and that defendants Cora D. Spencer and Robert L. Clayton have no interest in the probating or annulling the probate of the will of Moses Hubbard deceased.

Wherefore defendants pray the court to dismiss the bill for misjoinder of parties defendant.

GEO. R. SMITH,
W. R. ABERNATHY,
CECIL H. SMITH,
Attorneys for Defendants.

Third.

This bill is brought for the purpose of contesting the probate of the will of Moses Hubbard, deceased, and for the purpose of contesting, annulling and setting aside the probate of the will of Mary Jane Hubbard, Deceased. aid defendants represent and show to the court that heretofore on to wit: the — day of — A. D., 1906, the last will and testament of Moses Hubbard was admitted to probate in the County Court of Collin County, Texas. That said County Court of Collin County, Texas, sitting as a probate court had jurisdiction of the subject matter and of the estate and duly admitted to probate as the last will and testament, the will of Moses Hubbard, deceased, a copy of which is filed as an exhibit with complainants' bill.

That heretofore, to wit, on the — day of — A. D., 1914, the County Court of Collin County, Texas, sitting at probate, admitted to probate the last will and testament of Mary Jane Hubbard, an instrument a copy of which is attached to the exhibit filed by complainants with their bill herein.

That the County Court of Collin County, Texas, has and
34 had the exclusive jurisdiction in all probate matters, and that said Court of Collin County, Texas, sitting at probate is the only court having original jurisdiction to hear and try any contest of the probate of either of said wills.

That there is no statute of the State of Texas, to authorize any court of general jurisdiction to entertain original jurisdiction of the contest of either of said wills, and that all proceedings in said court of original probate jurisdiction or proceedings in rem are binding upon the whole world whether parties thereto or not.

Wherefore said defendants say that this court has not jurisdiction to hear and determine this matter, but that the County Court of Collin County, Texas, has the exclusive original jurisdiction to hear and determine the contest of said will.

Wherefore they pray this court that this cause be dismissed for the want of jurisdiction.

GEO. R. SMITH,
W. R. ABERNATHY,
CECIL H. SMITH,
Attorneys for Defendants.

Fourth.

The plaintiffs' bill shows upon its face that there is not that diversity of citizenship as will give this court jurisdiction of the subject matter in this:

It seeks for a partition of the property described in said bill and it appears from the allegations of the bill, that the defendant Cora D. Spencer is entitled to a distributive share of any sum or sums which plaintiffs might recover therein.

The petition alleging that complainants in the case are non-residents of the State of Texas, and also alleging that Cora D. Spencer is a resident of Collin County, Texas, said petition alleging that complainants, Albert E. Sutton, Delana M. Sutton, and Rachael E. Kirtley are the brothers and sisters of Mary Jane Hubbard, deceased, and are each entitled to $\frac{1}{4}$ distributive interest in her estate.

Said petition further alleging that Elizabeth E. Davis, George D. Sutton and Ida Kirchbaum, and the defendant Cora D. Spencer are the children of a deceased brother of Mary Jane Hubbard, and as such each would be entitled to a $\frac{1}{16}$ distributive interest in any sum or sums that plaintiffs may recover herein.

35 Wherefore said defendants say that said petition shows upon its face that there is not that diversity of citizenship as would give this court jurisdiction. They pray this court to dismiss this cause for the want of jurisdiction, it appearing that there is no diversity of citizenship.

GEO. R. SMITH,
W. R. ABERNATHY,
CECIL H. SMITH,
Attorneys for Defendants.

Fifth.

And for answer herein these defendants each deny that there is such a diversity of citizenship between the parties' interest herein as would give this court jurisdiction.

These defendants deny that the amount in controversy is One Hundred and sixty thousand dollars. These defendants deny that the amount in controversy on the part and behalf of each complainant is as much as Six Thousand Dollars.

These defendants deny that this action is for the construction of a will, but they aver on the contrary it is an action to contest validity of the will of Moses Hubbard the will of Mary Jane Hubbard, and that it is a partition suit in which they seek to recover for and on behalf of the plaintiffs who were non-residents of the

State, and defendant Cora D. Spencer against the defendants Trustees and District hereinabove mentioned.

Said defendants deny that any of the complainants or the defendant Cora D. Spencer are the heirs at law of Moses Hubbard. Defendants deny that Moses Hubbard was entirely without means or property when he settled in Collin County, Texas, but on the contrary aver that at the time of his marriage and subsequent thereto he acquired a large amount of property by gift, demise and descent, and the same was under the laws of Texas his separate property; and defendants deny that all of the property described in plaintiffs petition was the community property of Moses Hubbard and Mary Jane Hubbard.

Defendants deny that the community estate was of the value of One Hundred Thousand Dollars. Defendants deny that the personal property consisting of notes, stock, etc. was of the value of One Hundred Thousand Dollars. Defendants deny that the community property of Moses Hubbard descended unto the community survivor the said Mary Jane Hubbard, but on the contrary defendants aver that on to wit about the — day of — A. D., 1897, the said Moses Hubbard and Mary Jane Hubbard made and published their joint will, a copy of which is attached to the exhibit filed with complainants' bill. That by the terms of said will said Moses Hubbard and Mary Jane Hubbard devised and bequeathed their entire estate both community and separate, to the defendants Trustees and District, herein and their successors, all of the real and personal estate belonging to each and both of them, reserving to the survivor one-half of the revenue arising therefrom, directing that said Trustees take possession of all of said property real and personal, rent the same out and collect the rents, paying to the survivor one half of the same for his own use and benefit, and providing that the other one half should go for the purpose and maintenance of a Charitable Institution or learning known as Alla School, and providing that the survivor might direct how the other one-half of said proceeds should be spent, whether for the paying of teachers, erecting of buildings, or purchase of equipments.

That said will after the death of Moses Hubbard was duly probated in the County Court of Collin County, Texas, said court having jurisdiction of the parties and subject matter, and that the survivor Mary Jane Hubbard acquiesced in said probate and procured the probate thereof and accepted it under said will and received benefits, emoluments, rights and privileges that she would not have had but for said will, and she exercised said rights privileges etc. by reason whereof said will in so far as Mary Jane Hubbard was concerned was irrevocable.

Defendants deny that at the time Mary J. Hubbard executed the will disposing of the property acquired after the death of Moses Hubbard, which complainants seek to contest in this suit, and while she was in the very article of death, made and executed said will. Plaintiffs deny that she the said Mary Jane Hubbard was persuaded and influenced into the execution of said will, but on the contrary

say that the said Mary Jane Hubbard at the time of the execution of said will was of sound, disposing mind and memory, and that she was a woman far above the ordinary in educational attainments, a woman of excellent sense and judgment, and in all respects fully capacitated to comprehend and know the extent and value of her estate, the objects of her bounty, and to remember each and every relative, especially the complainants herein.

Plaintiffs further aver that the disposition by the said Mary Jane Hubbard of her said property in said will, was a reasonable and natural disposition. Defendants deny that at the time of
37 the execution of said will, the said Mary Jane Hubbard was clouded in intellect, they deny that she was not of a sound and disposing mind and memory, they deny that she did not remember the plaintiffs, but that at the time of the execution of said will was in the full possession of her mental faculties, and knew and appreciated the business at hand, the nature and extent of her estate and objects of her bounty.

Defendants deny that plaintiff Rachael E. Kirtley was forgotten by the said Mary Jane Hubbard, and deny that she was suggested by John H. L. C. English, or any other person. They deny that said John H. L. C. English suggested every other item of said will, or any item of same. They deny that the mind of said Mary Jane Hubbard at the time of signing said will, was weak and imbecile to the extent that she did not comprehend the contents of it, but on the contrary they aver that she did comprehend the contents of it, and the same was written at her dictation and prepared under her directions.

Defendants deny that she was induced to sign said will by the undue influence of the defendant English, but on the contrary they say that said English in no manner attempted to influence her actions, and in no manner attempted to dictate any item, term or condition of said will, and defendants deny that said English had any purpose or motive so to do. On the contrary they aver that the said English married the sister of Moses Hubbard and that he has a child by said sister who was a niece of Moses Hubbard and a niece of said Mary Jane Hubbard by marriage and that said Moses Hubbard devised no part of his estate to the daughter of said English or the wife of said English, and that Mary Jane Hubbard by her will, without suggestion from anyone did leave a legacy of \$500.00 to the daughter of said English, who was a niece by marriage of the said Mary Jane Hubbard and notwithstanding the near relation to the said Moses Hubbard and Mary Jane Hubbard this is the only property of the estates of either of them that was left to any relative of the said English.

They deny that said will should be annulled, set aside and held for naught, or any part of the same. They deny that in the event that the court should hold that the plaintiffs are entitled to recover herein, that the same should be divided as set forth in complainant's bill, to wit: one-fourth to Rachael E. Kirtley, $\frac{1}{4}$ to Albert E. Sutton, $\frac{1}{4}$ to DeLana M. Sutton, $\frac{1}{16}$ to George D. Sutton, $\frac{1}{16}$ to Elizabeth E. Davis, $\frac{1}{16}$ to Ida Kirchbaum and $\frac{1}{16}$ to Helen M. Marshall,

but on the contrary they aver that Cora D. Spencer is a sister
38 of George D. Sutton, Elizabeth E. Davis and Ida Krichbaum
and in the event of a partition that the said George D. Sutton,
Elizabeth E. Davis and Ida Krichbaum each be entitled to a 1/20
of said property so partitioned.

Defendants deny that complainants are entitled to any part of
said estate, or entitled to any partition herein. Defendants deny
further that for many years prior to the death of Mary Jane Hub-
bard that she was not stable in her actions or determinations, and
full mistress of herself or her acts nor her property. Defendants
deny that she was unduly influenced or in any way influenced by
the defendant, English, deny that she was absolutely subject to the
control of defendant, English, or any way subject to his control.

Defendants deny that said English managed and controlled and
dictated to her concerning her property, without respect to her will
or interest or in any other manner. They deny that defendant
English compelled her to submit to his control. Defendants deny
that he substituted his will for hers in any actions for a long prior
of years or in any actions at any time.

Defendants deny that he exercised any malignant control or any
other control during his lifetime, over the said Moses Hubbard.
They deny that said influence was actuated by his fostering, en-
couraging and catering to a mania of the said Moses Hubbard in
his lifetime, and his adjuration relative thereto after the death of
Moses Hubbard were imposed and coerced upon the mind of said
Mary Jane Hubbard; they deny that he overpowered her will and
wishes as to said community property or any other property, but
on the contrary defendants aver that both Moses Hubbard and
Mary Jane Hubbard were of exceptional mental attainments, that
Moses Hubbard was a practicing physician, engaged in active prac-
tice of his profession for many years after the execution of said
will, was honored and respected in the neighborhood for his ability
as a physician and for his sound business methods and his good
judgment. That he acquired and accumulated the greater part of
his estate in the immediate neighborhood where he lived and where
he established the Alla School, that some years prior to his death
he built a commodious school building at his own expense, one
sufficient to satisfy all the needs and requirements of the school at
that time, that he purchased and constructed two additional build-
ings situated on said land, to be used as homes for said teachers.
That he supplemented the teachers salaries in order to procure
efficient teachers and paid them their salaries out of his own means
to extend and prolong the school to a term of eight months in each
year.

39 That he was a person of strong mind and good judgment,
and he and his wife desired that the fortune they had accu-
mulated in that neighborhood should go back to the benefit of the
neighborhood which induced them to provide an indorsement of
said school and provide for its needs and support largely.

Defendants deny that Moses Hubbard was subject to a mania or
unsound idea relative to the memory of his deceased daughter, Alla

Hubbard Spencer. They deny that he was controlled by any mania in his investments and transactions. Defendants deny that he spent a considerable amount of money, or any amount of money to procure the manufacture of a brand of flour called the Alla Brand, they deny that there ever was such a brand of flour known as the Alla brand, but if mistaken in this, they say that the said Dr. Moses Hubbard was not instrumental in procuring a brand of flour by that name, nor was it named after his daughter.

Defendants aver that it is true that the said Moses Hubbard and Mary Jane Hubbard by their joint will, did dispose of their entire property subject to an interest to the survivor of one-half the revenues derived therefrom, for the indorsement, maintenance and support of the Alla School as set forth in the will, a copy of which is filed with complainants bill, by the terms of which will they did establish a charitable trust.

They deny that the same is a perpetuity in contravention of the laws of the State of Texas, but aver that it was specifically mentioned in said will, that in the event it should be decided that said trustees could not hold said lands without contravening the laws and constitution, then the same be sold and the proceeds be applied to said charitable trust.

Defendants deny that said trust is void because it is indefinite as to the parties beneficiary. They deny that said trust is void because the maker of said will had established no institution and none came into existence except at defendant's directions. On the contrary they aver that said institution had been established, a house erected and for a long time prior to the making and execution of said will, said Moses Hubbard and Mary Jane Hubbard out of their common funds had maintained the same as hereinafter alleged.

Defendants deny that said trust is void because it is beyond the power of the defendants named as trustees to admit or compel or procure the attendance therein of non-resident scholars beyond the scholastic age, but on the contrary they aver that said trust was for the benefit of all Caucasian children between the ages of 6 and 21 years in the event more applied than the funds would accommodate directing the Trustees to give preference to those who had attended
40 the school, those who lived in the district or adjoining district.

They deny that said trust is void for the reason that Moses Hubbard and Mary Jane Hubbard were constituted therein as intermediate beneficiaries ahead of said trust, but on the contrary they aver that said Trustees were directed to take charge of said property upon the death of either of them, rent the same, collect the rents, revenues, interest, etc., and apply one-half the proceeds to the maintenance and support of said school, rendering the other one-half to the survivor. That in truth and in fact on to wit; the year 1906, after the probate of the bill of said Moses Hubbard, said Trustees did take possession of all of said property, holding the same adverse to the whole world, and proceeded to carry out the trust as established and directed by the will of said Moses Hubbard.

Defendants further deny that said trust is void because the said Moses Hubbard was not of sound and disposing mind and memory,

but they aver on the contrary that the said Moses Hubbard was of sound and disposing mind and memory, a man of excellent judgment, wide experience, thoroughly educated and an able and active practicing physician at the time of the execution of the said will and for many years thereafter.

Defendants deny that said trust was void for the further reason that the said purported will did not contain language whereby any gift or devise or request or conveyance was made and because the property therein referred to was all community property.

Defendants deny that said survivor was to become and did become the sole owner and free from the testamentary disposition of said property. They deny that no testamentary disposition was made by the said Moses Hubbard, they deny that there was then and there created a naked trust whereof the said Mary Jane Hubbard was sole beneficiary, they deny that the Trustees therein had no interest; they deny that said trust was executed and determined for the sole benefit of said Mary Jane Hubbard.

Defendants deny that the defendants trustees never sought a settlement with the executor over the will and never received nor receipted thereunder with the executors for any of the property, and that they never until the proceedings hereinafter related, made claim to any person related nor at any time as trustee, they deny that they attempted to make private use of said property, both real and personal, or either of them without authority either in law or in equity. They deny that they converted the property and the proceeds thereof unto the private use and benefit of said English.

Defendants deny that to that end they converted and conveyed a portion of said property and real estate whereof he took title
41 unto himself, through the said conversion ex maleficio of
515.18 acres located in Denton County, State of Texas and described in complainants' bill, but they aver the facts to be that the deceased owned about 71 shares of stock in the D. C. Telephone line of the face value of \$10.00 per share. That the defendant J. H. L. C. English owned 656 shares of said stock. That divers and different persons had small holdings of stock in said D. C. Telephone line. That the said D. C. Telephone line was not a paying institution and it was — the interest of the estate, as much as the other holders of stock in said D. C. Telephone line to dispose of same. They got an opportunity to trade the entire capital stock of said Telephone Line for 515.18 acres of land. That as there were numerous persons interested in the stock in small amounts, the said John H. L. C. English, owning more than a majority of all the stock, it was agreed that the title should be taken in his name to facilitate a transfer of the same whenever it could be sold, and the said J. H. L. C. English took the said title in his own name at the instance of the different parties as they appeared, including the trust estate held by said trustees.

That he attached to said deed a statement of the interest held by each, respectively, so that upon the sale of the land, each stock holder including the trust estate held by the trustees, could receive their proportionate shares of the proceeds thereof. That said act was done in good faith and simply for the convenience of a transfer when they

might find a purchaser for said land, the same was understood and agreed by the stock holders of said D. C. Telephone Company.

Defendants deny that the suit instituted in the District Court of Collin County, Texas, was an attempt to increase the possession and control of said English, but on the contrary they aver that Mary Jane Hubbard by a deed duly executed, attempted to convey to the Texas Christian University a corporation located at Ft. Worth, Texas, some interest in the trust property held by said trustees for the benefit of Alla School. That thereupon in order to remove cloud from title and to establish the right of said trustee in and to all of said property, the said trustees caused to be instituted in the District Court of Collin County, Texas, a court of general jurisdiction, the same having jurisdiction of the subject matter and of the persons thereto, a suit against Texas Christian University and against Mary Jane Hubbard to cancel said deed of conveyance to said Texas Christian University to remove cloud from title of said trust estate, and to have said lands and property declared to be the property of
42 the Alla School and of the trustees controlling the same for said Alla school divesting all title out of the Texas Christian University and Mary Jane Hubbard in and to the lands involved in this litigation.

That citation was issued in said cause and the said Mary Jane Hubbard answered therein as defendant denying any interest in and to said property, save and except her interest in one-half the proceeds thereof during her lifetime and judgment that was had against her on said answer and disclaimer, and a judgment was had against said Texas Christian University divesting all rights title and interest of the T. C. U. and Mary Jane Hubbard in and to said lands, and vesting the said title in and to the said trustee of said Alla School in and for the benefit of said school.

That the said cause was tried before the Honorable F. E. Wilcox, special Judge, and agreed upon by the parties to try said cause, F. E. Wilcox a practicing attorney for more than 20 years' standing in the McKinney bar, the presiding judge at that time of said court, being disqualified to try the same that the said F. E. Wilcox qualified as special judge took the oath of office and tried said cause and rendered the judgment therein, which is of record, an exemplified copy of proceedings and judgment as well as an exemplified copy of the will and probate thereof of Moses Hubbard and an exemplified copy of the will and probate thereof of Mary Jane Hubbard will be filed as soon as the Clerk can prepare a transcript of the same, and we ask that the same be considered a part of this bill as though the same were copied in it.

Defendants allege that not sufficient time is allowed up to the day they are required to answer herein for the Clerk of the Court to prepare said copies, and they ask the indulgence of the court permitting said copies to be filed as soon as it is possible for them to be prepared and certified to. That the records of said case and the probate of said will is in the County Court of Collin County, Texas, and the record of said cause tried in the District Court is of record in said cause between trustees and Texas Christian University and Mary

Jane Hubbard in the records of the District Court of Collin County, Texas.

Defendants deny that said Mary Jane Hubbard had no notice of said actions and proceedings, they deny that she was in any manner deceived into signing a purported waiver and disclaimer therein, and deny that the same was without the knowledge and understanding of the said Mary Jane Hubbard, deny that any chicane or deceit was practiced on Mary Jane Hubbard or anyone else; they deny that

43 the same was wholly without consideration or was void or was a misuse of the forms of law; they deny that said judgment was never given or signed by any Judge or person possessing judicial power within the State of Texas. On the contrary they aver that said Judge F. E. Wilcox was an active practitioner of law in McKinney, Texas, and had been for more than 20 years, that he was duly selected and qualified to try said cause, because of the disqualification of the Judge pre-iding, that he accepted said appointment, took the oath of office, tried and adjudicated the case with all the due forms of law, and said judgment is in all respects valid and binding and forever divested out of the said Mary Jane Hubbard any interest that she may have had in and to said lands, except the right to receive one-half the rents and revenues during her lifetime. They deny that said District Court had not jurisdiction in the first instance.

Defendants deny that any petition was pending in the County Court for the construction of said will, and they aver that if any such petition had ever been filed that the same was dismissed and abandoned, the same having never been called for trial and no order ever having been made in the same for more than four years after the filing of same, if any was filed. They deny that said court had jurisdiction in the first instance to construct a will, and if it ever had jurisdiction to construct the same, if any motion ever had been filed therein, the same had been dismissed and abandoned, by not having been called, continued or tried within four years after the filing of same.

Defendants deny that the Judge who assumed to act and did act was without power or authority from any cause to try the same, but they aver to the contrary that he was duly and legally selected and agreed upon by the parties, the heirs, legal representatives and assigns are now estopped from in any way impeaching said judgment.

Defendants deny that any of said real estate was originally usurped by the said J. H. L. C. English, but they aver the fact to be that all of said real estate was taken possession of by said Board of Trustees, defendants herein, immediately after the probating of the will of Moses Hubbard in 1906, it was taken possession of by virtue and under the authority of said will, and said Trustees have owned, held, controlled and had the actual possession of same, holding the same, under title and paying taxes on the same and holding the same, adverse to the whole world for more than three years next before the filing of this suit, they further aver that by reason of which plaintiffs' claim is barred by the Statute of Limitation.

44 Defendants further aver that the said John H. L. C. English and the other trustees named herein, immediately after the probate of the will of said Moses Hubbard took possession of all of said premises under and by virtue of said will, a recorded instrument in Collin County, Texas, and have held the same in their actual possession, paid all taxes on same for more than five years prior to the institution of this suit, and have held the peaceable and adverse possession thereto for more than five years prior to the filing of this suit, and plaintiffs' claim, if any they ever had, is barred by the Statute of five years' limitation, and further herein plaintiffs aver that the said John H. L. C. English and the other Trustees named herein, took actual possession of all of said lands and personal property described in complainants' bill on towit, the — day of —, A. D. 1906, under and by virtue of the will of the said Moses Hubbard which had theretofore been duly probated and duly recorded in the probate records of Collin County, Texas, and held the peaceable and adverse possession of same from said date up to the filing of this suit, which is more than eight years, and plaintiffs herein were appraised of said holding and appraised of said possession, they have acquiesced therein, said trustees having paid all of the taxes thereon and exercised ownership to the exclusion of the entire world, wherefore they say complainants' claim is invalid and demands therefrom a stale demand, and by reason of said limitation and stale demand they are precluded from recovering herein.

Defendants deny that said John H. L. C. English has converted to his own use and benefit the rents of said land, deny that the use and occupation of said land has been of the fair and annual profits of the value of six thousand dollars, and that the plaintiffs are entitled to charge said sum annually to the said English together with the earnings and interest thereon from the date when he assumed possession.

Defendants further deny that plaintiffs are, without remedy at law, but on the contrary aver that the probate court of Collin County, Texas, a court having exclusive jurisdiction in probate matters, is open to them.

GEO. R. SMITH,
W. R. ABERNATHY,
CECIL H. SMITH,
Attorneys for said Defendants.

Endorsed: No. 47. In Equity. Albert E. Sutton et al. vs. John H. L. C. English et al. Original answer of John H. L. C. English et al. Filed Sept. 4, 1915. J. R. Blades, Clerk U. S. Court, by M. E. Wright, deputy.

45 *Application to Probate Will of Moses Hubbard.*

THE STATE OF TEXAS,
County of Collin:

In the County Court of Collin County, Texas, July Term, A. D. 1906.

To the Honorable County Court of Collin County:

Now comes your petitioners, J. H. L. C. English, B. F. Spencer, and F. S. Finley, J. T. Robinson and W. L. Yarbrough, and would respectfully show to your Honorable Court that Moses Hubbard departed this life in Collin County, Texas, on or about the 26th day of May, 1906. That prior to his death the said Moses Hubbard had resided in Collin County, for the space and period of about 40 years; that he owned property situated in Collin County, consisting of lands, and personal property, of the value of about Sixty Thousand Dollars.

Petitioners would further show that the said Moses Hubbard left a will which is herewith filed, in which he nominated J. H. L. C. English, B. F. Spencer, Dan P. English, F. S. Finley and the Superintendent of Public Instructions, as executors of his will, that he provided in his will that the said Executors should be residents of Collin County, Texas. That the said Dan P. English, has removed from Collin County, and the said will provided that the majority of the Executors should have power to fill vacancies; that said executors have nominated and appointed J. F. Robinson in the place of Dan P. English.

These petitioners would further show to the Court that it was the intent and purpose of the said Moses Hubbard and of the said Mary Jane Hubbard, his wife, who also joined in the execution of the will, that they should make a joint will which should be probated at the death of each of them and that by the terms of the will and the intent of the will the personal property on hand at the death of either of them should vest in the survivor and that upon the death of the survivor the personal property then on hand should be impressed with the trust created by the will.

That a question having risen among them, these Executors pray that the will be now so construed and that the Court in the order probating the will construe the same and give them directions as to the disposal of the personal property and in the execution of their trust.

Your petitioners therefore, pray that all proper notices be given that upon hearing said will be probated, and that no bond be required of them, as the will exempts them from bond and that no further action be had except to construe return an inventory, and appraise-ment and list of claims and probate said will.

ABERNATHY & ABERNATHY,
Attorneys for Petitioners.

Filed June 12th, 1906.

W. M. SHIRLEY,
Clerk County Court, Collin County, Texas,
By G. E. STROTHER, *Deputy.*

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THE STATE OF TEXAS,
County of Collin:

In the name of God amen:

We, Moses Hubbard and Mary Jane Hubbard, of Collin County, being of sound mind and disposing memory, mindful of the uncertainty of life and of the certainty of death, wishing to dispose of the effects, it has pleased Almighty God to bless us with while we have strength of mind and body so to do, do make, publish, and declare this to be the last will and testament of us, and of each of us hereby revoking all others by us made and we each direct that as each of us die this instrument shall be probated as the will of such deceased person.

Item 1st. We commend our spirits to God, who gave them and our bodies to the dust whence they came directing our executors in this will to give us decent burial, and to erect for us a monument commensurate and suitable to our means and station in life.

Item 2nd. It is our desire and that of each of us, that as each of us dies all property then owned by us shall descend and rest in the following named persons, and their successors in this trust, to-wit: J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley, and the Superintendent of Public Instructions for Collin County, who shall take and hold all the property, real and personal, and mixed, owned by us at the death of either of us for the purposes, uses and trusts and as herein after directed and vacancies in whose number shall be filled herein directed.

Item 3rd. Upon the death of either of us the trustees shall receive the rents revenues and profits arising from all of said property and shall lend all moneys having same well secured, or invest same in interest bearing bonds, rents of lands. One half of the net proceeds shall be paid to any person and in any manner and for any purpose the survivor may direct. The other half shall be used and paid out in the same manner and for the same purposes as the rents and revenues of the property are herein directed to be paid and appropriated after the death of both of us but the survivor has the right during lifetime to determine the specific manner of expenditure. That is whether it shall be used in employment of teachers, erection of buildings, purchase of apparatus or other germane uses, etc.

Item 4th. Upon the death of both of us the Trustees herein provided for shall take and hold all the property herein bequeathed, which shall constitute and be divided unto two funds: one of which shall be a permanent fund and which shall not be lessened or diminished in any manner, or for any purposes. The other fund shall be the available fund and may be expended, used and applied as directed herein.

The permanent fund under this instrument shall consist of all our

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real estate, stocks, notes and cash, and such addition as under the provisions of this will may from time to time be added thereto. The additions to the permanent fund shall come from the rents, revenues, profits and interest, arising from the permanent fund, and shall in no year be less than one third, but on an average shall be one-half of such rents, revenues, profits and interest and the balance of the rents, revenues, profits and interest shall be set aside and used as an available fund.

Item 5th. Believing that we have the love of God in our hearts for the manifold blessing he has bestowed upon us, and desiring to add to the happiness and improvement of our neighbors, we have founded an institution for increase and diffusion of knowledge which we have named "Alla" and which shall remain permanently located on the same survey on which it is now located, to wit: Wade H. Rattan, and it is our desire that the Trustees herein provided for shall use the available fund herein provided for in the employment of teachers, erection of proper and necessary buildings, the purchase of apparatus, and other germane uses and it is our desire that at this school or institution of learning all children whose parents are Caucasian and of the white race, and who are over the age of six years and under the age of 21 years, shall be admitted free of tuition, but in case more apply than the funds on hand will justify, then the Trustees in determining who shall be admitted are requested to give preference to worthy students who have been in attendance before and those residing in the school district or adjacent thereto.

The term Germane uses is intended to receive a liberal construction and to authorize the use of all means deemed proper by the trustees for diffusion of knowledge but we do not desire a sectarian school taught. The Holy Bible may be used, and we pray may be the rule and guide of both instructor and pupil.

Item 6th. The trustees shall have no power to sell or alienate the real estate devised herein, but it shall be preserved and its rents, revenues, be applied for the charitable uses but should it be determined by the judgment of a Court of competent jurisdiction after a bona fide trial, in which nothing must be agreed upon that this limitation is invalid, then and only in that event we direct the trustees to sell said land and hold the proceeds as part of the permanent fund, it is, however, our wish that the lands shall never be sold if it be legal to hold them as here provided.

48 Item 7th. Confiding in the honor and integrity of J. H. L. C. English, Dr. B. F. Spencer, Dan P. English and F. S. Finley, and the person who may be Superintendent of Public Instruction for Collin County, Texas, we appoint trustees of this fund and executors of each of our wills.

Item 8th. Should we survive any of the executors or trustees the majority of those living may fill out by election their number to complete the number contemplated by this instrument, which is five (5) and in case of the death or refusal to act of any of the number at any time, either at our death or at any time the majority may fill vacancies but the trustees must be residents of Collin County, Texas, it being our intention to create a perpetual body to this end the Trus-

tees may if advised that it would better advance the purposes herein intended in corporate under the name "Alla" no stock shall be issued.

Item 9th. It is our desire that the Trustees herein provided for, towit, J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, and F. S. Finley, and the Superintendent of Public Instruction for Collin County, Texas, be not required to give bond, it is further our desire that no one be elected or act as Trustee who is not a resident of Collin County, Texas, and that a change of residence from Collin County, Texas, shall be cause of removal from trusteeship and the property court is authorized and requested to require bond of subsequent trustees if deemed best for preservation of fund.

Item 10th. The trustees shall have no power ever to create any debt and shall make no purchases or contract a liability beyond a present liability to pay cash.

Item 11th. It is our desire that no further action be had in the County in reference to the settlement of our estate than the probating of this will of each of us, the return of an inventory and appraisement and list of claims.

Witness our hands, this the 5th day of January, 1897, in the presence of S. T. Cunningham, J. E. Kerr, C. E. Francis, C. B. Fields, W. A. Gossett and W. E. Francis, whom we request to sign as attesting witnesses to this, our last will and testament.

MOSES HUBBARD.

MARY JANE HUBBARD.

49 S. T. CUNNINGHAM.
J. E. KERR.
C. E. FRANCIS.
C. B. FIELDS.
W. A. GOSSETT.
W. E. FRANCIS.

Witnesses.

THE STATE OF TEXAS,
County of Collin:

The foregoing instrument signed, published, and declared in our presence, by Moses Hubbard, to be his last will and testament, and we at his request, and in his presence, and in the presence of each other, signed the same as attesting witnesses, each of us being over the age of 21 years.

S. T. CUNNINGHAM.
C. E. FRANCIS.
W. A. GOSSETT.
J. E. KERR.
C. B. FIELDS.
W. E. FRANCIS.

THE STATE OF TEXAS,
County of Collin:

The foregoing instrument was signed, published and declared in our presence, by Mary Jane Hubbard, to be her last will and testament, and we, at her request, and in her presence and in the presence of each other, signed the same as attesting witnesses, each of us being over the age of 21 years.

S. T. CUNNINGHAM.
C. E. FRANCIS.
W. A. GOSSETT.
J. E. KERR.
C. B. FIELDS.
W. E. FRANCIS.

Filed June 12, 1906. W. M. Shirley, Clerk County Court, Collin County, Texas, by G. E. Strother, deputy.

July 31st, 1906.

Estate of Moses Hubbard, Deceased.

Now on this day came on to be heard the application of J. H. L. C. English, to probate the last will and testament of Moses Hubbard, and came the applicant in person and by attorney, and it appearing to the court that the application to probate said will had been filed more than 20 days before the first day of this term of said court, and that notice of the filing of said application had been given in the manner for the length of time required by law, and no protest or objection having been filed, and it further appearing to the court that the testator was over the age of twenty one years, and that he was of sound mind and memory, and that said Will had been executed under the forms and with the solemnities required by law, and the court being fully satisfied in the premises, It is ordered adjudged and decreed by the Court that the papers herein filed in this Court, bearing the day of — be established according to its terms and provisions as the last will and testament of Moses Hubbard.

It is further ordered that J. H. L. C. English, B. F. Spencer, and W. L. Yarbrough be, and they are hereby appointed executors of the last will and testament of Moses Hubbard, dec'd.

It is further ordered that they be required to give no bond in said administration.

It is further ordered that A. Callahan, J. W. Kerr and S. J. Lewis be appointed appraisers of said estate and that the Clerk of this court record same.

Endorsed: No. 47. In Equity. Albert E. Sutton et al. vs. John H. L. C. English et al. Exhibit to defendants' original answer. Filed February 19, 1916, J. R. Blades, Clerk U. S. Court, by M. E. Wright, deputy.

Thursday, 14th, May, 1914.

At a regular term of County Court of Collin County, Texas, begun and holden at Court House thereof, in the City of McKinney, on Monday, the 12th day of April, 1914.

Present and presiding, Hon. H. L. Davis, County Judge, Pearl Strother, County Clerk, A. Robertson, Sheriff.

The following proceedings in Probate were had:

No. 2476.

In the Matter of Estate of Mary Jane Hubbard, Dec'd.

On this 14th day of May A. D., 1914, came on to be heard the application for the Probate of the last will and testament of the deceased, and for letters thereon, filed herein, on the 11th day of March, A. D., 1914.

And it appearing to the Court that legal notices of the filing of said application have been issued and posted in the manner and for the length of time required by law and no one came to contest the same; and it further appearing from the testimony of the subscribing witnesses to said will, sworn to and subscribed in open court, and filed herein, that said Mary Jane Hubbard, deceased, died in the County of Collin, in the State of Texas, where her residence and principal estate was situated, on the seventh day of February, A. D., 1914, that said deceased, at the time of executing said will, was over 21 years of age, and of sound mind, that said will was executed with the formalities and solemnities—and under the circumstances required by law to make it a valid will; that said will has not been revoked by said testator.

51 It is therefore ordered and decreed by the Court that said will is hereby proven and established as the last will and testament of said Mary Jane Hubbard deceased, and that R. L. Clayton, named in said will, be, and he is appointed executor of said will and estate, and bond set at \$20,000.00, and that J. H. L. C. English, Mr. Button, and J. F. Buchanan, are appointed appraisers of said estate.

I, Mary Jane Hubbard, of the County of Collin and State of Texas, being of sound and disposing mind and memory, and being desirous to settle my worldly affairs while I have strength to do so, do make this my last will and testament, hereby revoking all others heretofore by me made.

1st, I desire and direct that my body be buried in a decent and Christian like manner, suitable to my circumstances and conditions in life.

2nd. I desire and direct that my just debts be paid out of my estate without delay, by my executor to be hereinafter appointed.

3rd. I give and bequeath to my beloved neice, Cora D. Spencer, my home, in the town of Celina, same being Lots Nos. 13-14 and

15 in Block 17, to have and to hold unto her, the said Cora Spencer, in fee simple, forever.

4th. I give and bequeath to my esteemed friend, Mrs. Sarah E. Neeley, three shares of Bank stock in the First State Bank of Celina, to have and to hold the same, together with the profits and income thereof unto her, the said Sarah E. Neeley, in fee simple forever.

5th. I give and bequeath to my loving sister, Mrs. Rachael E. Kirtley, my twenty shares of bank stock in the Celina State Bank, to have and to hold the same unto her, the said Rachael E. Kirtley, together with the profits and income thereof, in fee simple forever.

6th. I give and bequeath to my loving niece, Miss Mary Emma English, one thousand (\$1000.00) Dollars in land notes, to have and to hold the same, to her, the said Mary Emma English forever.

7th. I give and bequeath to my esteemed friend Mrs. Sarah E. Neeley, Five Hundred (\$500.00) Dollars in land notes to have and to hold the same unto her, the said Sarah E. Neeley, forever.

8th. I give and bequeath to my loving nephew, Frank S. Spencer, Fifteen Hundred (\$1,500.00) Dollars worth of land notes, to have and to hold the same unto him, the said Frank S. Spencer, forever.

9th. I give and bequeath to my loving niece, Mrs. Alla Hubbard Farnsworth, Five Hundred (\$500.00) Dollars to have and to hold the same unto her, the said Alla Hubbard Farnsworth, forever.

10th. I give and bequeath to little Miss Lorine Neeley, Five Hundred (\$500.00) Dollars, to have and to hold unto her, the said Lorine Neeley, forever. And it is my wish and I so direct that Sarah E. Neeley, mother of little Miss Lorine have charge of said \$500.00 and manage same to the best interest of little Lorine, and pay the same to her, together with the income thereof, when she arrives at the age of twenty one years, or marries.

11th. I give and bequeath to my loving niece, Mrs. Cora D. Spencer, all my household goods and furnishings, to have and to hold the same unto her, the said Cora D. Spencer, forever.

12th. I give and bequeath all the residue of my property that has not been bequeathed, including all jewelry, to my loving niece, Mrs. Cora D. Spencer, to have and to hold the same to her in fee simple, forever.

13th. And lastly, I do nominate and appoint R. L. Clayton, to be the executor of this, my last will and testament.

In testimony whereof, I have hereunto set my hand, this the 5th day of February, A. D., 1914.

MARY JANE HUBBARD.

Signed, declared and published by Mrs. Mary Jane Hubbard, as her last will and testament, in the presence of us, the attesting witnesses, who have hereto subscribed our names in the presence of said Mrs. Mary Jane Hubbard, at her special instance and request, this 5th day of February, A. D., 1914.

J. H. L. C. ENGLISH,
M. BUTTON,
J. T. BUCHANAN.

Endorsed: No. 47. In re Albert E. Sutton et al., vs. John H. L. C. English et al. Exhibit to defendant's answer. Filed February 28, 1916, J. R. Blades, Clerk U. S. Court, by M. E. Wright, deputy.

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Oath of Office.

I, F. E. Wilcox do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me, as special District Judge, to try cause No. 7072, in the District Court of Collin County, Texas, J. H. L. C. English, et al. vs. Texas Christian University, et al., according to the best by my skill and ability, agreeable to the constitution and laws of the United States, and of this State; and I do solemnly swear that, since the adoption of the constitution of the State I, being a citizen of this State, have not fought a duel with deadly weapon, nor have I acted as second in carrying a challenge, or aided, advised or assisted any person thus offending; and I further swear that I have not, directly nor indirectly paid, offered or promised to pay, contribute or promised to contribute, any money or valuable thing, or promised any public office or employment for the giving or withholding a vote at the election at which I was elected.

So help me God.

F. E. WILCOX.

Subscribed and sworn to before me, this the 22d day of February, 1913.

[L. s.]

A. S. WHEATLEY,
Clerk, District Court, Collin County Texas,
By F. K. SNEED, *Deputy.*

No. 7072.

J. H. L. C. ENGLISH et al.

vs.

TEXAS CHRISTIAN UNIVERSITY.

SATURDAY, February 22, 1913.

Now on this day came on to be heard the above entitled cause and whereas, Honorable J. M. Pearson, the duly elected and qualified District Judge for the 59th Judicial District is sick and unable to hold court, and whereas, G. R. Smith, Attorney, of this bar, has been duly and legally chosen as such Judge to hold this term of the District Court in Collin County, Texas; and whereas, said G. R. Smith is disqualified from trying the above entitled cause, he being of counsel for plaintiff, and whereas, by reason of the premises there can be no exchange of Judges, and whereas, there appears filed among the papers in this cause instruments in writing duly signed by all of the parties hereto, plaintiffs and defendants, in which it is agreed that the Honorable F. E. Wilcox, an attorney of this bar, be selected and is

hereby selected for the trial of said cause. And he having duly
taken the oath of office thereupon, the parties hereto announce
54 ready for trial.

And it appearing to the court that said agreement- are in
words and figures as follows, towit:

In the District Court of Collin County, Texas, February Term, 1913.

No. 7072.

J. H. L. C. ENGLISH et al.

vs.

TEXAS CHRISTIAN UNIVERSITY.

It is hereby agreed by the Texas Christian University one of the
defendants in the above entitled cause, that Honorable F. E. Wilcox,
may and shall act as special Judge in this cause, and that this de-
fendant will be fully bound by all his acts in the premises as judge
of the Court aforesaid, in the said cause.

(Signed)

FLOURNOY, SMITH & STORER,

Attorneys for Defendant, Texas Christian University.

No. 7072. In Dist. Court Collin Co. J. H. L. C. English et al.
vs. Texas Christian University. Agreement by deft. Texas Christian
University for special judge. Filed Feb. 22, 1913, A. S. Wheatley,
Clerk District Court Collin County Texas, By F. K. Sneed, deputy.

#2.

No. 7072.

J. H. L. C. ENGLISH et al., Trustees,

vs.

TEXAS CHRISTIAN UNIVERSITY et al.

I, Mary J. Hubbard one of the defendants in the above styled and
Numbered cause, come now and agree and select F. E. Wilcox to act
and sit as Special Judge in the trial of said cause.

(Signed)

M. J. HUBBARD.

Witnesses:

ROBT L. CLAYTON.

M. BUTTON.

Filed Feb. 22, 1913 A. S. Wheatley, Clerk District Court, Collin
County, Texas, by F. K. Sneed, deputy.

Suit Pending in the District Court, Collin County, Texas.

No. 7072.

J. H. L. C. ENGLISH et al.

vs.

TEXAS CHRISTIAN UNIVERSITY et al.

55 Now comes the plaintiff herein, J. H. L. C. English, et al,
in the above styled and numbered cause and agree and hereby
select Judge F. E. Wilcox as special Judge in the above cause.

G. R. SMITH,

W. R. ABERNATHY,

Attorneys for Plaintiffs,

J. H. L. C. English et al.

Filed, Feb. 22, 1913. J. H. L. C. English trustees, vs. Texas Christian University et al. Agreement on special Judge.

And whereas, the Honorable F. E. Wilcox has accepted said position as Judge to try this cause and has duly taken the oath of office on file with the papers of this cause, and a jury being waived and the matters of fact as well as of law being submitted to the court, and the court after hearing the pleadings, and it appearing to the court that the plaintiffs' cause of action is for trespass to try title and to remove cloud from title. And it appearing to the court that the defendant, Texas Christian University, has filed a disclaimer herein disclaiming all right, title and interest to any of the lands sued for in words and figures as follows, to wit:

In the District Court of Collin County, Texas, February Term, 1913.

No. 7072.

J. H. L. C. ENGLISH et al.

vs.

TEXAS CHRISTIAN UNIVERSITY et al.

Now comes Texas Christian University, one of the defendants in the above cause by attorney- and says:

That it disclaims all and any interest, title or estate of whatsoever character in the lands described in plaintiffs' petition herein, and in any property made the subject matter of this suit, and prays to be dismissed, hence with its costs, on this disclaimer.

(Signed)

FLOURNOY, SMITH & STORER,

Attorneys for Defendants, Texas Christian University.

No. 7072. In District Court Collin County. J. H. L. C. English et al. vs. Texas Christian University et al. Disclaimer by defendant, Texas Christian University. Filed Feb. 22, 1913. A. S. Wheatley, Clerk District Court Collin Co. Texas, By F. K. Sneed, deputy.

56 And it is further appearing to the court that Texas Christian University has been duly and legally cited to appear and answer herein and in time to require an answer to this term of the court, and that no answer has been filed herein, except said disclaimer.

And it further appearing to the court that Mary Jane Hubbard, the other defendant herein, has also filed a disclaimer herein, disclaiming, in favor of plaintiff and any all right, title and interest in and to the land sued for subject to her rights to receive one half of the rents and revenues of said property during her lifetime and subject to her right to direct the disbursement of the other half, during her lifetime, as provided for in the will of Moses Hubbard, dec'd, a copy of which is attached to plaintiff's original petition. The disclaimer of Mary Jane Hubbard is as follows, to wit:

Suit Pending in the District Court of Collin County, Texas.

No. 7072.

J. H. L. C. ENGLISH et al.

VS.

TEXAS CHRISTIAN UNIVERSITY et al.

I, Mary Jane Hubbard, one of the defendants in the above styled and numbered cause, come now and disclaim in favor of plaintiffs any and all right, title or interest in and to any of the lands set out and described in plaintiffs' petition except as herein specified; and agree that judgment may be rendered in favor of plaintiffs as prayed for in their petition, subject to my rights in the rents, revenues and profits arising from said lands.

M. J. HUBBARD.

Witnesses—

ROBT L. CLAYTON.

M. BUTTON.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin County, Texas, by F. K. Sneed, deputy."

And all parties having announced ready for trial, it is therefore considered by the court that plaintiffs herein, to wit: J. H. L. C. English, F. S. Finley, J. T. Robinson, and W. E. Foster, Superintendent of Public Instruction of Collin County, trustees of Alla School fund in their fiduciary capacity should have and recover the title and possession of the lands described in plaintiffs' original petition as follows, to wit: (1) Situated in Collin County, Texas, on the divide between Honey Creek and Little Elm Creek, the same being 54 $\frac{3}{4}$ acres deeded to J. F. P. Fleming and Sarah Fleming and C. P. Fleming and M. J. Fleming by Marion A. Maples, and wife by deed dated July 24th, A. D. 1899, and recorded in Book 93, pages

324-5-6 and 7, Collin County, Records of Deeds, Beginning at the southwest corner of a 40 acre tract conveyed to R. M. Tillerson by J. R. Greer and wife, M. N. Greer; thence west 30.28 chs. to a rock the northwest corner of the Queen Survey; thence north 11.50 chs. to a bois d'arc stake on the north line of the G. W. Estes 74 acre survey; thence east 9.33 chs. to the northeast corner of said Estes survey; thence north 9.50 chs. a rock; thence east 20.95 chs. to the northwest corner of said Tillerson 40 acre tract; thence south 21 chs. to place of beginning, containing $54\frac{3}{4}$ acres of land, more or less 24.1 acres in the W. B. Tucker, 19.9 acres in the W. M. Shawver and $10\frac{1}{4}$ acres in the G. W. Estes surveys.

(2) Situated in said County on the waters of Little Elm about 14 miles N. 40 W. from McKinney being the whole of a survey of 640 acres in the name of the heirs of W. M. Ratton, Abst. No. 609 and Beginning at S. M. Boyd's S. W. corner, a post from which a cluster of Hackberry brs. N. 6 E. 231 vrs; thence west with J. M. Herrins N. line 1874 vrs. a post from which an elm brs. N. $28\frac{1}{2}$ E. 413 vrs.; another brs. N. 34 E. 423 vrs; thence north 1644 vrs. a post from which a willow brs. N. $73\frac{1}{2}$ E. 243 vrs.; thence east 2613 vrs. a post on Sam'l Queen's west line from which an elm brs. N. 46 E. 80 vrs.; thence south 718 vrs. said Queen's S. W. corner; thence west 738 vrs. said Boyd's N. W. corner; thence south 927 vrs. to the beginning, bearings marked X, containing 630 acres more or less.

(3) Situated on the waters of Honey Creek in Collin County, and being a part of the headright survey and being a part of the Thompson Helms and bounded as follows: Beginning in the center of Honey Creek a short distance above the Lacy Springs a point from which a cottonwood mkd. X brs. N. $41\frac{1}{2}$ deg. west 44 links, also a double black oak brs. south $64\frac{1}{2}$ east 62 lks.; thence down the center of Honey Creek to the mouth of a certain branch which is the west boundary line of a tract of land now owned by James Helms; thence up the center of said branch to a place from which a black oak and pecan brs. 5.81 deg. W. the oak 45 lks. the pecan 47 lks.; thence west to the place of beginning, containing nine acres, be the same more or less.

(4) Situated in Collin County on the waters of Little Elm Creek about 15 miles N. W. from McKinney being a part of a survey made in the name of Geo. W. Estes. Beginning at the S. E. corner of said Estes survey a rock, the N. E. corner of the W. M. Ratton survey from said rock, an elm 14 in. in dia. mkd. X. brs. N. 56 deg. E. 336 lks.; thence west 31.42 chs. a rock the S. W. corner of the Estes survey; thence N. 27.13 chs. a bois d'arc stake the S. W. corner of the Thos. Kendall 160 acre survey; thence E. with the S. line of said Kendall survey 31.42 chs. a bois d'arc stake; thence S. 27.13 chs. to the place of beginning, containing 85.25 acres.

(5) 40 acres of land situated on the waters of Honey Creek in Collin County, being a part of that part of the 640 headright survey made in the name of Larkin Adamson, assignee of John Culwell that was conveyed to David Best by Joseph Hearne and wife and bounded as follows, towit: Beginning in the center of a ravine and

S. W. corner of the aforesaid headright survey; thence east (vs. 9 Deg. 30'') with the S. P. line thereof 27 chs. and 18 lks. to a post on said S. P. line; thence north 16 chs. and 61 lks. to the center of a branch from which a spotted oak 12 in. in dia. mkd. X brs. S. 27 deg. E. 50 lks., elm same size and mark brs. S. 52 W. 69 lks.; thence up the center of said branch in a westerly direction to the N. B. line of said headright survey; thence south with said W. B. line 9 chs. and 89 lks. to the place of beginning.

(6) Situated in Collin County, in the State of Texas, on the waters of Little Elm Creek and bounded as follows, towit: Beginning at a bois d'arc stake in the center of the road in John Herron survey; thence N. 45 lks. to the N. W. corner of the J. M. Herron survey; thence E. 78.73 chs. with the south boundary line of the Moses Hubbard farm to the south E. corner of the Moses Hubbard farm; thence S. 45 lks. to a rock in the center of the road; thence W. 78.73 chs. to the place of beginning and containing four acres of land, the same being a part of the John M. Herron survey.

(7) Situated on the waters of East Fork of Trinity River about 10½ miles N. 46 deg. W. from McKinney, being a part of a survey of 550 acres of land, in the name of Mary Howell, Abstract No. 299, Beginning 267 vrs. north of L. Routh's N. E. corner a stake the S. W. corner of said Mary Howell survey; thence north 950 vrs. a stake in the W. B. line of said survey; thence east 950 vrs. a stake; thence south 950 vrs. a stake in the S. B. line of said survey; thence west therewith 950 vrs. to the place of beginning, containing one hundred and sixty acres of land more or less.

It is further considered by the Court that any cloud cast upon plaintiff's title by reason of the claim of defendant or either of them should be removed subject, however, to the right of Mary Jane Hubbard, to receive a life interest in the rents and revenues as

59 hereinafore stated.

It is therefore ordered, adjudged and decreed that plaintiffs, J. H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, Superintendent of Public Instruction, of Collin County, as Trustees of Alla School Fund in their fiduciary capacity as such, do have and recover of and from the Texas Christian University, the title and possession of the land hereinabove described, and that any cloud cast upon said title by reason of any adverse claim of the said Texas Christian University, be and the same is hereby removed.

It is further ordered, adjudged and decreed by the court that the plaintiffs herein named, and in the capacity herein stated, do have and recover of and from the defendant, Mary Jane Hubbard, the title and possession of the lands hereinabove described; and it is further ordered, adjudged and decreed that the cloud cast upon the title of said lands by reason of any adverse claim of the said Mary Jane Hubbard be, and the same are removed except in so far as she is entitled to receive one-half of the rents and revenues during her natural life derived from said property, and except in so far as she has the right to direct the disbursement of the other half of said revenues, during her natural life as provided in the will of Moses

Hubbard, dec'd duly probated in the County Court of Collin County, Texas.

It is further ordered, adjudged and decreed that plaintiffs above named do have and recover of and from the defendants above named judgment of their disclaimer as herein filed.

It is further ordered, adjudged and decreed that the plaintiffs herein above named and in their fiduciary capacity, be taxed with all cost incurred herein by reason of the disclaimer of said defendants, for all of which let execution issue.

Endorsed: No. 47 in Equity. Albert E. Sutton et al. vs. John H. L. C. English et al. Exhibit to defendant's original answer. Filed Feb. 19, 1916. J. R. Blades, Clerk U. S. Court, by M. E. Wright, deputy.

60 In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 47. In Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH et al.

To Hon. Gordon Russell, Judge of said Court:

Now come defendants, Cora D. Spencer and Robert L. Clayton, and for answer herein represent and show to the court:

I.

Said defendants adopt the motions, denials and answers of this day filed in this court by defendants, John H. L. C. English et al. as their motions, denials and answers herein.

II.

Said defendants say that on the — day of —, 1914, when the will of Mary Jane Hubbard was offered for probate in the County Court of Collin County, that these plaintiffs and their representatives filed in said court a contest of the validity of said will; that thereafter and before said will was admitted to probate, said plaintiffs and their representatives in open court admitted the testamentary capacity of Mary Jane Hubbard, and the validity of her will, and that such admission so made in open court became, was and is a part of the judgment in probating said will, and that these plaintiffs are estopped now to say that said will or any of its provisions is invalid.

III.

Said defendants say that they do not question the validity of the wills of Moses Hubbard or Mary Jane Hubbard, and that they have

no desire that the property of said Moses Hubbard and Mary Jane Hubbard shall go in any other way than as directed in their respective wills, but defendant Cora D. Spencer says that if upon the hearing of this case the court shall be of the opinion that said wills are invalid, and that the estates of Moses Hubbard and Mary Jane Hubbard descend to their heirs, and are subject to partition, then she asks the court that one-twentieth (1/20) of said estate be set apart to her as a grand child and heir of Mary Jane Hubbard deceased, and for such other and further relief as she is entitled to in the premises.

CHARLES BATSELL,

*Attorney for Defendants Cora D. Spencer
and Rob't L. Clayton.*

61 Endorsed: No. 47 In Equity. Albert E. Sutton et al vs. John H. L. C. English et al. Original Answer of Cora D. Spencer and Robert L. Clayton. Filed, Sept. 4th, 1915. J. R. Blades, Clerk U. S. Court, by M. E. Wright deputy.

In the District Court of the United States for the Eastern District of Texas, Sherman Division,

ALBERT E. SUTTON, DE LANA M. SUTTON, RACHAEL E. KIRTLEY, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Krichbaum, Complainants,

vs.

JOHN H. L. C. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, and District Number 67 in the County of Collin, and State of Texas, a Municipal Corporation; Cora D. Spencer, and Robert L. Clayton, Defendants.

To the above named defendants, Honorable C. H. Smith and Messrs. Freeman & Batsell and Abernathy & Abernathy, Their Solicitors:

Please take notice that at the Federal Court Room on Friday, December 31st, 1915, at ten o'clock A. M., or as soon thereafter as counsel can be heard, the complainants will present their motion and application unto said court or the Judge thereof in Chambers, for an order requiring the defendants, by an early date, to answer certain interrogatories as part of their answer herein.

ALLEN G. FISHER,

Complainants' Solicitor.

December 30, 1915.

Due, legal and timely notice of this application by copy, and copy of application and interrogatories admitted.

W. H. ABERNATHY,

GEO. R. SMITH,

CECIL H. SMITH,

Defendants' Solicitors.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

ALBERT E. SUTTON, DE LANA M. SUTTON, RACHAEL E. KIRTLEY, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Krichbaum, Complainants,

vs.

JOHN H. L. C. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E. Foster, Superintendent of Public Instruction of Collin County 62 Texas, and District Number 67 in the County of Collin and State of Texas, a Municipal Corporation; Cora D. Spencer, and Robert L. Clayton, Defendants.

To the Honorable the District Judge presiding in said Court:

Complainants respectfully show that the answer of the defendants herein is not yet completed, by reason of the fact that an exemplification of the record of the District Court of Collin County, Texas, has not yet been filed.

Complainants respectfully show that the answer of the defendants herein is not yet completed, by reason of the fact that an exemplification of the record of the District Court of Collin County, Texas, has not yet been filed.

Complainants respectfully show that it is necessary and material that the defendants should answer interrogatories upon certain points which are peculiarly within their own knowledge and are competent and material for complainants to know and to be shown unto the court before the trial herein of the issues of fact, and that said matters are indicated by the interrogatories hereunto attached and made part of this application.

Complainants therefore pray the court that an order be passed herein requiring that the said defendants shall cause to be filed herein by an early date the answers to the interrogatories herewith and that the same be answered upon the corporal oath of the defendants and the defendants' officials as therein named.

ALLEN G. FISHER,
Complainants' Solicitor.

Interrogatory- relative to the value of the matter and amount in controversy to be answered under oath by W. E. Foster, County Superintendent of Public Instruction of Collin County, Texas.

Interrogatory I. State the full amount for purposes of taxation for the year 1915, for which each separate tract of land described in the bill of complaint was valued under oath by the assessor or corresponding officer of Collin County, of defendant school district?

Interrogatory II. State the full amount for purposes of taxation for the year 1915 for which the personal property enumerated in bill of complaint was valued under oath or official return by the same officer?

63 Interrogatory III. Set out and attach a copy of the return made for the year 1915, by Alta School District to you, as county superintendent.

Interrogatory IV. Set out and attach a copy of the return made for the year 1914, by Alta school district to you as county superintendent?

Interrogatory relative to the value and amount in controversy to be answered under oath by cashier of the county depository of Collin County, Texas, for the defendant school district, and trustees of school district.

Interrogatory I. State separately for each year from 1906 to 1915 inclusive, the full amount, if any, paid into your bank as depository for the benefit and as part of the funds of Alta school District of Collin County, Texas, and of District Number 67, in the County of Collin, and State of Texas, by John H. L. C. English and others, as trustee, under the will of Moses Hubbard, or by, thru or under any other claim of obligation thereunto?

Interrogatories relative to the value and amount in controversy to be answered under oath separately by each John H. L. C. English and F. S. Finney and J. T. Robinson and W. E. Foster, defendants.

Interrogatory I. State separately for each year from 1906 to 1915, inclusive, the full sums and amount, if any, paid by you as trustees under and by virtue of the will of Moses Hubbard to the county depository of Collin County, for the benefit of Alta School District, and for School District 67 in Collin County, Texas?

Interrogatory II. State separately for each of the same years 1906 to 1915, inclusive, the full sums and amount, if any, paid by you as such trustees unto Mary J. Hubbard?

Interrogatory III. State separately for each of said years 1906 to 1915, inclusive, the full sums and amounts, realized and received by each of you as such trustee?

64 Interrogatory IV. State separately for each year 1906 to 1915, inclusive, the full sums and amount paid out, laid out and expended by you and each of you, for any and every item of charge or expense of administration of the said supposed trust, and for the entire charges and expense of maintenance of the said real estate and the said personal property?

Interrogatory V. State what is the actual and fair market value on August 1st, 1915, of each separate tract of land described in the bill of complaint?

And also state what was the actual and fair market or cash value of, on August 1st, 1915, each separate item of personal property held by you, in trust, under the will of Moses Hubbard, as you claim it was held?

Interrogatory VI. State whether or not from 1906 to August 1st, 1915, there has been any increase in value per acre of the land described in the bill of complaint?

Interrogatory VII. State whether or not, during any single year from 1906 to 1915, there has been any increase in value per acre of the land described in bill of complaint? If so, how much in each year? And what years?

Interrogatory VIII. State whether or not in February, 1913, you had any conversation with Mary Jane Hubbard, now deceased, at or near her home, at or near the town of Celina, relative to her interest right or title in the land described in the bill of complaint?

Interrogatory IX. State who were present and heard such conversation?

Interrogatory X. State whether or not you or any attorney employed by you had any conversation with Mary Jane Hubbard, now deceased, in February 1913, at her home, or near there, at or near Celina, Collin County, Texas, relative to or concerning the suit you were about to file, or had then filed against her in Collin County District Court, and relative to the land in suit? If your answer be yes, state the name of the attorneys and who were present participating in said conversation?

Interrogatory XI. State whether or not said conversation was taken down and is now written and preserved? If your answer be yes, set out a copy thereof as a portion of your answer to this interrogatory.

Also state by whom this was written? And if the writer
65 was in your employ, or the employ of your attorney or any person acting for you?

Endorsed: No. 47 In Equity. Albert E. Sutton vs. John H. L. C. English, et al. Interrogatories. Filed December 31, 1915, J. R. Blades, Clerk U. S. Court, by M. E. Wright, deputy.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. 47. In Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH.

Answers of Defendant John H. L. C. English, Interrogatories Propounded to Him, Filed in the Above Cause on December 31, 1915.

Answer to Interrogatory 1.

During the years inquired about I have paid no money into the County Depository of Collin County, for the benefit of the Alta School District, in any capacity.

Answer to Interrogatory II.

The Trustees under will of Moses Hubbard, deceased, paid to Mary J. Hubbard, the following sums inquired about:

In 1906.....	\$66.90
In 1907.....	1635.30
In 1908.....	1702.14
In 1909.....	2625.47
In 1910.....	1458.44
In 1911.....	2368.50
In 1912.....	2277.11
In 1913.....	2178.15
In 1914.....	2048.95

Mary J. Hubbard died in February, 1914, but in the early part of that year she received a large part of the revenue arising from a crop, raised during the year, 1913, Mrs. Hubbard having died, no payments were made to her or any one representing her in 1915.

Answer to Interrogatory III.

During the year- inquired about the Trustees raised and received from the Hubbard estate, the following gross sums:

66	In 1906.....	\$1,587.82
	In 1907.....	3,440.07
	In 1908.....	2,963.43
	In 1909.....	5,463.82
	In 1910.....	5,532.07
	In 1911.....	2,627.34
	In 1912.....	6,437.11
	In 1913.....	3,866.38
	In 1914.....	3,074.03
	In 1915.....	5,810.45

Answer to Interrogatory VI.

During the years inquired about the Trustees paid for taxes, maintenances, improvements, and upkeep, of the Estate and for expense of litigation, the following sums:

In 1906.....	\$410.08
In 1907.....	365.88
In 1908.....	1,579.71
In 1909.....	2,160.45
In 1910.....	808.98
In 1911.....	630.75
In 1912.....	2,187.02
In 1913.....	3,780.72
In 1914.....	1,872.31
In 1915.....	4,957.22

During the years inquired about, the Trustees of the Hubbard estate paid to the teachers of the Alta School District, the following sums:

In 1903.....	\$160.00
In 1907.....	628.14
In 1908.....	530.00
In 1909.....	560.20
In 1910.....	590.00
In 1911.....	796.12
In 1912.....	680.00
In 1913.....	516.11
In 1914.....	635.00
In 1915.....	424.50

In addition to the above, under the terms of the will of Moses Hubbard, the sum of \$1,000.00 was expended in payment of a monument, placed over his grave.

In the keep-up expenses hereinbefore set forth, is included the money expended in preserving the estate, and also, the money expended in keeping in repair the Alta School Building, and ground, and other expenses incident to conducting the school, save and except the item of teachers' salaries.

Answer to Interrogatory V.

The separate tracts of land belonging to the Hubbard estate listed according to the survey in which they are located, and their fair market value in August 1, 1915, are as follows:

- 40 acres of the J. Caldwell survey, \$1,400.00.
- 94 acres of the G. W. Estes survey, \$4,700.00.
- 3 acres of the J. M. Herron survey occupied and used as a public road and of no value to the estate.
- 160 acres of the M. Howell survey, \$12,000.00.
- 7 acres of the T. Helm survey, \$350.00.
- 628 acres of the W. J. Rattan survey, \$47,100.00.
- 20 acres of the W. W. Shawver survey, \$1,000.00.
- 25 acres of W. R. Tuckers survey, \$1,250.00.

In Equity—About one thirteenth interest in 515 acres of land William Carter's survey in Denton County, Texas. \$250.00.

The personal property belonging to said Hubbard Estate and its fair market value, August 1, 1915, is as follows:

- 98 shares of the Celina Mill & Elevator stock of the par value of 100 per share, worth \$12,000.00.
- 10 shares of stock in the Pilot Point Nat'l Bank, worth \$1,250.00.

Answer to Interrogatory VI.

There has been some slight variations and fluzuations in the value of land in Collin County, in the period inquired about, but the lands inquired about were worth about the same in 1906 as they were on the 1st of August, 1915.

Answer to Interrogatory VII.

From the year 1906 to July, 1914, there was an increase in the value of lands such as are involved in this suit, of from \$5.00 to \$10.00 per acre but since July 1915, there has been little demand for lands and very little land sold, and the price has declined until Aug. 1915, and the price of land of the character involved in this suit are about the same as they were in 1906.

Answer to Interrogatory VIII.

I am unable to state whether on February 1913, I had any conversation with Mary Jane Hubbard, deceased, at her home, relative to her interest, title and right, in said land described in the Bill of Complaint. I have had a number of conversations with her in reference to this matter and probably had such a conversation with her about the time inquired.

Answer to Interrogatory IX.

I recall that in one conversation I had with Mrs. Hubbard, about the time inquired about that the Pastor of her church was present, I am unable to recall his name.

Answer to Interrogatory X.

About February 1913, I was at the home of Mrs. Hubbard, with our attorneys, W. R. Abernathy and George G. Smith, and Miss Emily Pendergrass, who was the stenographer of Mr. W. R. Abernathy.

I understand that the attorneys had a conversation with Mrs. Hubbard on this occasion but if I heard same or any part of same, I have no recollection of it.

Answer to Interrogatory XI.

I do not know whether the conversation between the attorneys and Mrs. Hubbard was taken down, written out and preserved or not, and I am unable to attach to my answer a copy of such conversation written out.

JOHN H. L. C. ENGLISH.

Subscribed and sworn to before me this January 29, 1915.

A. M. SCOTT,

Notary Public Collin County, Texas.

Endorsed: In the District Court of the United States for the Eastern District of Texas, Sherman Division. Albert E. Sutton et al., vs. John H. L. C. English et al. No. — Equity. Answers of defendant John H. L. C. English, of the interrogatories propounded to him by plaintiff. Filed February 1st, 1916, J. R. Blades, Clerk U. S. Court by M. E. Wright deputy.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. —. Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH.

Answers of J. W. Ashley, cashier of Collin County National Bank, McKinney, Texas, the County Depository of Collin County, Texas, to interrogatories propounded to him, filed in the above cause on December 31, 1915.

Answer to Interrogatory I.

The bank with which I am connected is and since the 31st day of January, 1916, has been the County Depository of Collin County. No money has been paid into said depository for the benefit and as a part of the funds of Alta School District of Collin County, Texas, and of district No. 67 by John H. L. C. English, or others as trustees under the will of Moses Hubbard, or in any other capacity.

J. W. ASHLEY.

Sworn to and subscribed before me this January 31, 1916.

HENRY W. WOODALL,

Notary Public in and for Collin County, Texas.

69 Endorsed: In the District Court of the United States for the Eastern District of Texas, Sherman Division. Albert E. Sutton et al. vs. John H. L. C. English, No. — Equity. Answers of J. W. Ashley, Cashier of the Collin County National Bank, of McKinney, Texas, to the interrogatories propounded him by plaintiff. Filed February 1, 1916. J. R. Blades, Clerk U. S. Court, by M. E. Wright, deputy.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. —. Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH.

Answers of defendant Rhea Gossett, to interrogatories propounded to him, filed in the above cause on December 31, 1915.

Answer to Interrogatory I.

During the years inquired about I have paid no money into the County Depository of Collin County for the benefit of Alta School District, in any capacity.

Answer to Interrogatory II.

During the years inquired about I have paid no sums of money to Mary J. Hubbard, under the will of Moses Hubbard, I am one of the trustees, John H. L. C. English is the executive head of the trustees under said will, and has personally handled the trust funds, and made the disbursements with my approval and consent. I am familiar with his books, and have a general knowledge of the business, but am unable from my own knowledge to state amounts, but from my information and belief I adopt as my answers the answers of John H. L. C. English, as the true statement of the amounts paid.

Answer to Interrogatory III.

The amounts realized during the years inquired about upon information and belief I state to be correctly stated in the answers of John H. L. C. English to his interrogatory and I adopt his answers.

Answer to Interrogatory IV.

During the years inquired about I am unable to give the amounts from my personal knowledge, but from information and belief state that the amounts stated by John H. L. C. English, in his answer to this interrogatory are correct, and I adopt the same.

70

Answer to Interrogatory V.

The separate tracts of land belonging to the Hubbard estate, listed according to the survey in which they are located, and their fair market value in August, 1915, are as follows:

40 acres of the J. Caldwell survey, \$1,400.00.

94 acres of the G. W. Estes survey, \$4,700.00.

3 acres of the J. M. Herron survey occupied and used as a public road, and of no value to the estate.

160 acres of the M. Howell survey, \$12,000.00.

7 acres of the T. Helm survey, \$350.00.

628 acres of the W. J. Rattan survey, \$47,100.00.

20 acres of the W. W. Shawver survey, \$1,000.00.

25 acres of the W. R. Tuckers survey, \$1,250.00.

In Equity—about one thirteenth interest in 515 acres of land—William Carter's survey in Denton County, Texas, \$250.00.

The personal property belonging to the said Hubbard Estate and its fair market value, August 1, 1915, is as follows:

98 shares of the Celina Mill & Elevator Stock of the par value of 100 per share, worth \$12,000.00.

10 shares of stock in the Pilot Point National Bank, worth \$1,250.00.

Answer to Interrogatory VI.

There has been slight variations and fluctuations in the value of land in Collin County, in the period inquired about, but the lands

inquired about were worth about the same in 1906 as they were on the 1st day of August, 1915.

Answer to Interrogatory VII.

From the year 1906 to July, 1914 there was an increase in the value of lands such as are involved in this suit, of from \$5.00 to \$10.00 per acre, but since July, 1915, there has been little demand for lands and very little land sold, and the price has declined until Aug. 1915, and the price of land of the character involved in this suit are about the same as they were in 1906.

Answer to Interrogatory VIII.

I had no conversation with Mary Jane Hubbard at all, in February or any other time, relative to her interest, right or title in the land, described in the Bill of Complaint.

Answer to Interrogatory IX.

I had no such conversation.

Answer to Interrogatory X.

71 I had no conversation. I do not know whether any attorney employed by the trustees did or not. I know nothing about this matter.

Answer to Interrogatory XI.

I know nothing about such conversations.

RHEA GOSSETT.

Subscribed and sworn to before me this, January 29, 1915.

A. M. SCOTT,
Notary Public Collin County, Texas.

Endorsed: In the District Court of the United States for the Eastern District of Texas. Sherman Division. Albert E. Sutton et al. vs. John H. L. C. English. No. —. In Equity. Answers of Defendant Rhea Gossett of the interrogatories propounded to him by plaintiff. Filed February 1st, 1916. J. R. Blades, U. S. Clerk, by M. E. Wright, deputy.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. —. Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH.

Answers of defendant W. E. Foster, County Superintendent of Public Instruction of Collin County, Texas, to the interrogatories propounded to him, filed in the above cause on December 31, 1915.

Answer to Interrogatory I.

The following is a list of the lands and variations as rendered for taxes for the year 1915.

Abstract No.	Original grantee.	Acres rendered	Value.
208	J. Culwell	40	\$ 480.00
299	G. W. Estes	94	1,880.00
377	J. M. Herron	3	90.00
395	M. Howell	160	4,800.00
401	T. Helms		180.00
853	W. H. Rattan	628	15,700.00
810	W. W. Shawver	20	360.00
917	W. R. Tucker	25	450.00

Answer to Interrogatory II.

As I understand, the personal property was not rendered by the trustees but being shares of stock in corporation, the corporation, itself, rendered this property, and I cannot give the amount of the rendition, nor the values.

72

Answer to Interrogatory III.

No return was made to me, as County Superintendent, in the year 1915, by the Alla School District.

Answer to Interrogatory IV.

No return was made in the year 1914, by the Alla School District, to me, as County Superintendent.

W. E. FOSTER.

Subscribed and sworn to before me, this the 31st day of December, A. D., 1915.

[L. S.]

HENRY W. WOODALL,
Notary Public, Collin County, Texas.

Endorsed: In the District Court of the United States for the Eastern District of Texas. Sherman Division. Albert E. Sutton et al. vs. John H. L. C. English. No. —. Equity. Answers of defendant W. E. Foster, of the interrogatories propounded to *by* by plaintiff. Filed February 1st, 1916, J. R. Blades, Clerk U. S. Court by M. E. Wright, deputy.

73 In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. —. Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH.

Answers of defendant J. T. Robinson, to interrogatories propounded to him, filed in the above cause on December 31, 1915.

Answer to Interrogatory I.

During the years inquired about I have paid no money into the County Depository of Collin County for the benefit of Alta School District in any capacity.

Answer to Interrogatory II.

During the years inquired about I have paid no sums of money to Mary J. Hubbard, under the will of Moses Hubbard, I am one of the trustees, John H. L. C. English is the executive head of the trustees under said will, and has personally handled the trust funds, and made the disbursements with my approval and consent. I am familiar with his books, and have a general knowledge of the business, but am unable from my own knowledge to state amounts, but from my information and belief I adopt as my answers the answers of John H. L. C. English, as the true statement of the amounts paid.

Answer to Interrogatory III.

The amounts realized during the years inquired about upon information and belief I state to be correctly stated in the answers of John H. L. C. English to his interrogatory and I adopt his answers.

Answer to Interrogatory IV.

During the years inquired about I am unable to give the amount from my personal knowledge, but from information and belief state that the amounts stated by John H. L. C. English, in his answer to this interrogatory are correct, and I adopt the same.

Answer to Interrogatory V.

The separate tracts of land belonging to the Hubbard estate, listed according to the survey in which they are located, and their fair market value in August 1, 1915, are as follows:

40 acres of the J. Caldwell survey, \$1,400.00.

94 acres of the G. W. Estes survey, \$4,700.00.

3 acres of the J. M. Herron survey, occupied and used as a public road, and of no value to the estate.

160 acres of the M. Howell survey, \$12,000.00.

7 acres of the T. Helm survey, \$350.00.

628 acres of the W. J. Rattan survey, \$47,100.00.

20 acres of the W. W. Shawver survey, \$1,000.00.

25 acres of the W. R. Tuckers survey, \$1,250.00.

In Equity—about one thirteenth interest in 515 acres of land William Carter's survey in Denton County, Texas, \$250.00.

The personal property belonging to the said Hubbard Estate and its fair market value, August 1, 1915, is as follows:

98 shares of the Celina Mill & Elevator Stock of the par value of 100 per share, worth, \$12,000.00

10 shares of stock in the Pilot Point National Bank, worth, \$1,250.00.

Answer to Interrogatory VI.

There has been slight variations and fluctuations in the value of land in Collin County, in the period inquired about, but the lands inquired about were worth about the same in 1906 as they were on the 1st day of August, 1915.

Answer to Interrogatory VII.

From the year 1906 to July, 1914, there was an increase in the value of lands such as are involved in this suit, of from \$5.00 to \$10.00 per acre, but since July, 1915, there has been little demand for lands and very little land sold, and the price has declined until Aug. 1915, and the price of land of the character involved in this suit are about the same as they were in 1906.

Answer to Interrogatory VIII.

I had no conversation with Mary Jane Hubbard at all, in February or any other time, relative to her interest, right or title in the land, described in the Bill of Complaint.

Answer to Interrogatory IX.

I had no such conversation.

Answer to Interrogatory X.

75 I had no conversation. I do not know whether any attorney employed by the trustees did or not. I know nothing about this matter.

Answer to Interrogatory XI.

I know nothing about such conversation.

J. THOS. ROBINSON.

Subscribed and sworn to before me this, January 29, 1915.

A. M. SCOTT,

Notary Public Collin County, Texas.

Endorsed: In the District Court of the United States for the Eastern District of Texas, Sherman Division. Albert E. Sutton et al. vs. John H. L. C. English. No. — Equity. Answers of defendant, J. T. Robinson of the interrogatories propounded to him by the plaintiff. Filed February 1st, 1916. J. R. Blades, Clerk U. S. Court, by M. E. Wright, deputy.

76 In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. —. Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH.

Answers of defendant F. S. Finley, to interrogatories propounded to him, filed in the above cause on December 31, 1915.

Answer to Interrogatory I.

During the years inquired about I have paid no money into the County Depository of Collin County for the benefit of Alta School District in any capacity.

Answer to Interrogatory II.

During the years inquired about I have paid no sums of money to Mary J. Hubbard, under the will of Moses Hubbard, I am one of the trustees, John H. L. C. English is the executive head of the trustees under said will, and has personally handled the trust funds, and made the disbursements with my approval and consent. I am familiar with his books, and have a general knowledge of the business, but am unable from my own knowledge to state amounts, but from my information and belief I adopt as my answers the answers of John H. L. C. English, as the true statement of the amounts paid.

Answer to Interrogatory III.

The amounts realized during the years inquired about upon information and belief I state to be correctly stated in the answers of John H. L. C. English to his interrogatory and I adopt his answers,

Answer to Interrogatory IV.

During the years inquired about I am unable to give the amount from my personal knowledge, but from information and belief state that amounts stated by John H. L. C. English, in his answer to this interrogatory are correct, and I adopt the same.

77

Answer to Interrogatory V.

The separate tracts of land belonging to the Hubbard estate, listed according to the survey in which they are located, and their fair market value in August 1, 1915, are as follows:

40 acres of the J. Caldwell survey, \$1,400.00.

94 acres of the G. W. Estes survey, \$4,700.00.

3 acres of the J. M. Herron survey, occupied and used as a public road, and of no value to the estate.

160 acres of the M. Howell survey, \$12,000.00.

7 acres of the T. Helm survey, \$350.00.

628 acres of the W. J. Rattan survey, \$47,100.00.

20 acres of the W. W. Shawver survey, \$1,000.00.

25 acres of the W. R. Tuckers survey, \$1,250.00.

In Equity—about one thirteenth interest in 515 acres of land William Carter's survey in Denton County, Texas, \$250.00.

The personal property belonging to the said Hubbard Estate and its fair market value, August 1, 1915, is as follows:

98 shares of the Celina Mill & Elevator Stock of the par value of 100 per share, worth, \$12,000.00

10 shares of stock in the Pilot Point National Bank, worth, \$1,250.00.

Answer to Interrogatory VI.

There has been slight variations and fluctuations in the value of land in Collin County, in the period inquired about, but the lands inquired about were worth about the same in 1906 as they were on the 1st day of August, 1915.

Answer to Interrogatory VII.

From the year 1906 to July, 1914, there was an increase in the value of lands such as are involved in this suit, of from \$5.00 to \$10.00 per acre, but since July, 1915, there has been little demand for lands and very little land sold, and the price has declined until Aug. 1915, and the price of land of the character involved in this suit are about the same as they were in 1906.

78

Answer to Interrogatory VIII.

I remember that some time along about February 1913, don't know what month or exactly what year I was at Mrs. Hubbard's and heard her talking about the land, but I cannot now remember just what was said by her.

Answer to Interrogatory IX.

I think, Mr. English was there at the time I heard her speaking of the land.

Answer to Interrogatory X.

As stated, I was only at Mrs. Hubbard's one time. Do not remember what month or year but think in the early part of 1913. At that time I heard her talking about the land described in the Bill of Complaint, but I do not now remember just what was said by her. I do not know whether any attorney employed by the Trustees ever had a conversation with her or not or anything about this.

Answer to Interrogatory XI.

The conversation I heard was not taken down in writing or preserved. I know nothing about any other conversation at any other time.

F. S. FINLEY.

Subscribed to and sworn to before me, this the 29th day of January, 1915.

A. M. SCOTT,
Notary Public, Collin County, Texas.

Endorsed: In the District Court of the United States for the Eastern District of Texas, Sherman Division. Albert E. Sutton et al. vs. John H. L. C. English. No. —. Equity. Answers of defendant, F. S. Finley of the interrogatories propounded to him by plaintiff. Filed Feb. 1, 1916, J. R. Blades, Clerk U. S. Court, by M. E. Wright, deputy.

79 In the District Court of the United States for the Eastern District of Texas, Sherman Division.

No. —. Equity.

ALBERT E. SUTTON et al.

vs.

JOHN H. L. C. ENGLISH.

Answers of defendant W. E. Foster, to interrogatories propounded to him, filed in the above cause on December 31, 1915.

Answer to Interrogatory I.

During the years inquired about I have paid no money into the County Depository of Collin County for the benefit of Alta School District in any capacity.

Answer to Interrogatory II.

During the years inquired about I have paid no sums of money to Mary J. Hubbard, under the will of Moses Hubbard, I am one of the trustees, John H. L. C. English is the executive head of the trustees under said will, and has personally handled the trust funds, and made the disbursements with my approval and consent. I am familiar with his books, and have a general knowledge of the business, but am unable from my own knowledge to state amounts, but from my information and belief I adopt as my answers the answers of John H. L. C. English, as the true statement of the amounts paid.

Answer to Interrogatory III.

The amounts realized during the years inquired about upon information and belief I state to be correctly stated in the answers of John H. L. C. English to his interrogatory and I adopt his answers.

Answer to Interrogatory IV.

During the years inquired about I am unable to give the amount from my personal knowledge, but from information and belief state that amounts stated by John H. C. L. English, in his answer to this interrogatory are correct and I adopt the same.

80

Answer to Interrogatory V.

The separate tracts of land belonging to the Hubbard estate, listed according to the survey in which they are located, and their fair market value in August 1, 1915, are as follows:

40 acres of the J. Caldwell survey, \$1,400.00.

94 acres of the G. W. Estes survey, \$4,700.00.

3 acres of the J. M. Herron survey, occupied and used as a public road, and of no value to the estate.

160 acres of the M. Howell survey, \$12,000.00.

7 acres of the T. Helm survey, \$350.00.

628 acres of the W. J. Rattan survey, \$47,100.00.

20 acres of the W. W. Shawver survey, \$1,000.00.

25 acres of the W. R. Tuckers survey, \$1,250.00.

In Equity—about one thirteenth interest in 515 acres of land William Carter's survey in Denton County, Texas, \$250.00.

The personal property belonging to the said Hubbard Estate and its fair market value, August 1, 1915, is as follows:

98 shares of the Celina Mill & Elevator Stock of the par value of 100 per share, worth, \$12,000.00.

10 shares of stock in the Pilot Point National Bank worth, \$1,250.00.

Answer to Interrogatory VI.

There has been slight variations and fluctuations in the value of land in Collin County, in the period inquired about, but the lands

inquired about were worth about the same in 1906 as they were on the 1st day of August, 1915.

Answer to Interrogatory VII.

From the year 1906 to July, 1914 there was an increase in the value of lands such as are involved in this suit, of from \$5.00 to \$10.00 per acre, but since July, 1915, there has been little demand for lands and very little land sold, and the price has declined until Aug. 1915, and the price of land of the character involved in this suit are about the same as they were in 1906.

Answer to Interrogatory VIII.

I had no conversation with Mary Jane Hubbard at all, in February or any other time, relative to her interest, right or title in the land, described in the Bill of Complaint.

Answer to Interrogatory IX.

I had no such conversation.

Answer to Interrogatory X.

81 I had no conversation. I do not know whether any attorney employed by the trustees did or not. I know nothing about this matter.

Answer to Interrogatory XI.

I know nothing about such conversation.

W. E. FOSTER.

Subscribed and sworn to before me this January 29, 1915.

HENRY W. WOODALL,
Notary Public, Collin County, Texas.

Endorsed: In the District Court of the United States for the Eastern District of Texas, Sherman Division. Albert E. Sutton et al. vs. John L. C. English, No. —. In Equity. Answers of defendant W. E. Foster, to the interrogatories propounded to him by the plaintiff. Filed Feb. 1, 1916, J. R. Blades, Clerk U. S. Court by M. E. Wright, deputy.

82 In the District Court of the United States for the Eastern District of Texas, Sherman Division.

ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL E. KIRTLEY, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Krichbaum, Complainants, Separate Plaintiff in Error,

vs.

JOHN H. L. C. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, and District Number 67 in the County of Collin, and State of Texas, a Municipal Corporation, Cora D. Spencer and Robert D. Clayton, Defendants, Defendants in Error.

Judgment.

In this cause came for hearing upon the bills of complainants with the exhibits, and the answers of the defendants with the exhibits, and the interrogatories of complainants propounded to the defendant English and Trustees, and the answers of said English and Foster and Gossett to these interrogatories, and was argued upon the demurrers of the defendant contained in said answers upon the several grounds assigned therein. Allen G. Fisher, Esq., appearing for the complainants, and Cecil H. Smith, Esq., and Wm. R. Abernathy Esq., appearing for the defendants, English, Finney, Robinson, Foster and District No. 67, and arguing in behalf of said defendants the several demurrers, and the court having heard the argument of counsel, doth take the same under advisement to consider of the said demurrers and the authorities presented, and now, on this June 1st, A. D., 1916, the Court being fully advised in the premises, announces his judgment upon the matters submitted as follows:

Upon the demurrer that there is a misjoinder of causes of action, the court doth sustain said demurrer of the defendants to the bill herein, to which ruling and judgment each complainant asks, and is allowed an exception.

Upon the demurrer of the said defendants to the bill upon the ground that there is a misjoinder of parties defendant, the said demurrer is sustained in its entirety, to which ruling each complainant asks, and is allowed an exception.

Upon the demurrer to the bill upon the ground that therein is not shown a diversity of citizenship, the demurrer is sustained, to which ruling each complainant asks and is allowed an exception.

And upon the general demurrer upon the ground that this court is without power and jurisdiction to hear and determine the causes of action pleaded in said bill and its exhibits, but that under the

Constitution and laws of the State of Texas, the exclusive
83 original jurisdiction of the matters pleaded in the bills of complainants is entrusted to the County Court of Collin County, Texas, in probate, and to none other, and that by reason thereof this Federal Court has not jurisdiction to entertain

said action and determine the controversies pleaded herein the demurrer is sustained, to which ruling each complainant asks and is allowed an exception.

And thereupon each complainant, by his counsel, announces that he does not desire to plead further, but elects to stand upon his bill and exhibits and the record herein now made in that behalf.

It is thereupon considered ordered, and adjudged and decreed by the court now here that the bill and action of the complainants is dismissed, and that the defendants and each of them go hence without day and recover herein their costs.

GORDON RUSSELL,
*District Judge of the United States
for the Eastern District of Texas.*

Endorsed: No. 47. In United States District Court Eastern District of Texas, Sherman Division. Sutton et al. vs. English et al. Judgment. Filed June 1st, 1916. J. R. Blades, Clerk.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL E. KIRTLEY,
Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and
Ida Kirchbaum, Complainants,

vs.

JOHN H. L. C. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E.
Foster, Superintendant Public Instruction Collin County, Texas,
and District No. 67, in the County of Collin, and State of Texas,
a Municipal Corporation, Cora D. Spencer, and Robert L. Clayton,
Defendants.

In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no federal question was involved, and that the bill and its exhibits, in my opinion, disclosed the infraction of no right arising under or out of the federal laws or Constitution; but that under the Constitution and laws of the State of Texas, the sole court of original jurisdiction of the matters therein sought to be pleaded in the County Court of Collin County, Texas. By reason whereof, this court might not have jurisdiction or power to entertain the bills of complainants; And that
84 treating the demurrer as presenting this question of jurisdiction, and acting also independently of the demurrer, and on the court's own motion, the suit is dismissed only for the reasons above stated; that is, that the controversy, not arising under the laws and constitution of the United States, there is consequently no jurisdiction of the District Court of the United States.

And also on the ground that the record does not show that the controversy involved is one, in my opinion, between citizens of different states, but that it appears from the record that some of the defendants who should be considered as plaintiffs and the remainder

of the defendants are in fact citizens of the same state, and no other ground of jurisdiction appears from the record. The case is dismissed only for the reasons above stated, that is, that the controversy is not between citizens of different states, and consequently the Circuit Court of the United States has no jurisdiction; and for the reason assigned in the previous paragraph.

This certificate is made conformably to Act of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate, this the 1st day of June, A. D., 1916.

GORDON RUSSELL,
*District Judge, of the United States
for the Eastern District of Texas.*

Endorsed: No. 47. In United States District Court, Eastern District of Texas, Sherman Division. Sutton et al. vs. English et al. Certificate of judgment of dismissal on ground of want of jurisdiction. Filed June 1st, 1916. J. R. Blades, Clerk.

85 In the District Court of the United States for the Eastern District of Texas, Sherman Division.

ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL E. KIRTLEY,
Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and
Ida Crickbaum, Complainants, Separate Appellants,

vs.

JOHN H. L. C. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E.
Foster, Superintendent of Public Instruction of Collin County,
Texas, and District No. 67 in the County of Collin and State of
Texas, a Municipal Corporation; Cora D. Spencer and Robert L.
Clayton, Defendants, Appellees.

Assignment of Errors.

Each complainant in this action, in connection with his petition for appeal, makes the following assignment of errors, which he avers exists:

I.

The court erred in sustaining the demurrer of the defendants to the complainants' bill, and exhibits on the ground of want of jurisdiction over the cause of action pleaded therein.

II.

The court erred in sustaining the demurrer of the defendants on the ground that there was lacking a diversity of citizenship.

III.

The court erred in sustaining the demurrer of defendants on the ground of misjoinder of causes of action.

IV.

The court erred in sustaining the demurrer of defendants on the ground of misjoinder of parties.

V.

The court erred in dismissing complainants' bill.

VI.

The court erred in conceiving that no federal question was involved.

VII.

The court erred in conceiving that it was without jurisdiction or power to entertain the suit.

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VIII.

The court erred in dismissing the suit of its own motion.

IX.

The court erred in conceiving that under Article V of the Constitution of the State of Texas, and Section VIII thereof, and Article 1705 and 1706 of the Statutes of the State of Texas describing the jurisdiction of District Courts, that the suit of the complainants herein was not within the jurisdiction of this court, and was only within the exclusive jurisdiction of the County Court of Collin County, Texas, in probate; and that this was not a court of general jurisdiction of the State of Texas.

Wherefore, the District Court of the United States within and for Sherman Division, of the Eastern District of Texas, wherein is situate Collin County, Texas, was without jurisdiction or power to entertain the suit. Wherefore the complainants pray that said judgment be reversed.

ALLEN G. FISHER,
Attorneys for Complainants.

The foregoing assignments were presented and considered with the petition for appeal.

GORDON RUSSELL,
*District Judge of the United States
for the Eastern District of Texas.*

Endorsed: In the District Court of the Eastern District of Texas, Sherman Division. Albert E. Sutton et al., vs. John H. C. L. English et al., defendants. Assignments of error. Filed Nov. 6, 1916, J. R. Blades, Clerk.

87 In the District Court of the United States for the Eastern District of Texas, Sherman Division.

In Equity.

ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL E. KIRTLEY, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Crickbaum, Separate Appellant,

VS.

JOHN H. L. C. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. F. Foster, Superintendent of Public Instruction of Collin County, Texas, and District No. 67 in the County of Collin and State of Texas, a Municipal Corporation, Cora D. Spencer, and Robert L. Clayton, Appellees.

Petition for Appeal.

And now comes Albert E. Sutton, DeLana M. Sutton, Rachael E. Kirtley, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Crickbaum, appellants herein, and say that on or about the first day of June, 1916, the District Court entered a judgment herein in favor of the defendants, appellees, and against each of these plaintiffs, appellants, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of these appellants, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, each of these appellants prays that an appeal may be allowed in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ALLEN G. FISHER,

Attorney for each appellant.

Complainant.

Endorsed: United States District Court, In the Eastern District of Texas, Sherman Division. Albert E. Sutton et al., complainants, v. John H. L. C. English et al., defendants. Petition for allowance of appeal. Allen G. Fisher, Chadron, Nebr. Solicitor for complainants. Filed Nov. 6, 1916, J. R. Blades, Clerk.

88 In the District Court of the United States for the Eastern District of Texas, Sherman Division.

In Equity.

ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL E. KIRTLEY, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Crickbaum, Appellants,

vs.

JOHN H. C. L. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, and District No. 67 in the County of Collin and State of Texas, a Municipal Corporation, Cora D. Spencer, and Robert L. Clayton, Appellees.

Petition for Appeal.

This 6th day of November, 1916, comes each appellant by his attorney and files herein and presents to the court his petition praying for the allowance of an appeal, and an assignment of errors intended to be urged by him, praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the appeal upon the complainants giving bond, as appellants, according to law in the sum of Two Hundred and Fifty Dollars (\$250.00), which shall operate as a supersedeas bond.

GORDON RUSSELL,
*District Judge of the United States
for the Eastern District of Texas.*

Endorsed: In the United States District Court, Eastern District of Texas, Sherman Division. Albert E. Sutton et al., complainants, v. John H. C. L. English et al., defendants. Order allowing appeal. Filed Nov. 6, 1916, J. R. Blades, Clerk.

89 In the United States District Court for the Eastern District of Texas, Sherman Division.

ALBERT E. SUTTON, RACHAEL E. KIRTLEY, DELANA M. SUTTON, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Krickbaum, Complainants,

vs.

JOHN H. C. L. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E. Foster, District No. 67 in the County of Collin and State of Texas, a Municipal Corporation, Cora D. Spencer, and Robert L. Clayton, Defendants.

Appeal Bond.

Know all men by these presents: That we, Albert E. Sutton, and Rachael E. Kirtley, and DeLana M. Sutton, and Helen M. Marshall,

and Elizabeth E. Davis, and George D. Sutton and Ida Krickbaum, as principals, and United States Fidelity and Guaranty Company, a Maryland corporation, having its principal place of business in the City of Baltimore, in the State of Maryland, duly incorporated under the laws of the said State for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by law, and licensed by the commissioner of insurance and banking of the State of Texas, as surety, are held and firmly bound unto the above named John H. C. L. English, and F. S. Finney, and J. T. Robinson, and W. E. Foster, and District Number 67, in the County of Collin and the State of Texas, a municipal corporation, and Cora D. Spencer and Robert L. Clayton, in the penal sum of two hundred and fifty dollars to be paid to the said party; for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, administrators and assigns and successors, jointly and severally, yet firmly by these presents.

Sealed without seals and dated the fourth day of November, in the year of Our Lord one thousand nine hundred and sixteen.

Whereas, the above named plaintiffs, principals herein have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the judge of the district court of the United States for the Eastern District of Texas, in Sherman Division;

90 Now, therefore, the condition of this obligation is such that if the above named Albert E. Sutton, and Rachael E. Kirtley, and DeLana M. Sutton, and Helen M. Marshall, and Elizabeth E. Davis, and George D. Sutton and Ida Krickbaum shall prosecute such appeal to effect and answer all damages and costs if they shall fail to make said appeal good, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

ALBERT E. SUTTON,
RACHAEL E. KIRTLEY,
DELANA M. SUTTON,
HELEN M. MARSHALL,
ELIZABETH E. DAVIS,
GEORGE D. SUTTON,
IDA KRICKBAUM,

By ALLEN G. FISHER.
THE UNITED STATES FIDELITY
AND GUARANTY CO.,

By HALL & HARE, *Agents*.
LEGRANDE WOODS, *Att'y*.

Sealed and delivered and approved this 6th day of November, 1916.

GORDON RUSSELL,
District Judge.

Endorsed: In United States District Court, Eastern District of Texas, Sherman Division. Bond on Appeal. Filed Nov. 6, 1916, J. R. Blades, Clerk.

91 THE UNITED STATES OF AMERICA, ss:

To John H. L. C. English, F. S. Finney, J. T. Robinson, W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, and District Number 67, in the County of Collin and State of Texas, a Municipal Corporation, Cora D. Spencer and Robert L. Clayton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington on the 6th day of December, 1916, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Texas, wherein Albert E. Sutton, DeLana M. Sutton, Rachael E. Kirtley, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Crickbaum are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against said appellants should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the City of Sherman, in the District above mentioned, this 6th day of November, in the year of Our Lord, one thousand nine hundred and sixteen.

GORDON RUSSELL,
*Judge of the District Court of the United
States for the Eastern District of Texas.*

Due, legal and timely service of the foregoing citation upon each defendant, appellee, is admitted this 6th day of November, 1916.

W. R. ABERNATHY,
G. R. SMITH,
CECIL H. SMITH,
CHARLES BATSELL,
*Solicitors and attorneys for each
defendant, appellee.*

Endorsed: In the United States District Court, Eastern District of Texas, Sherman Division. Albert E. Sutton et al., complainants, vs. John H. C. L. English et al., defendants, citation and proof of service. Filed Nov. 6, 1916, J. R. Blades, Clerk.

92 In the District Court of the United States for the Eastern District of Texas, at Sherman.

ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL E. KIRTLEY,
Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida
Krickbaum, Complainants,

vs.

JOHN H. L. C. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, and District No. 67 in the County of Collin and State of Texas, a Municipal Corporation, Cora D. Spencer, and Robert L. Clayton, Defendants.

Præcipe for Record.

To the Clerk of said Court:

Please prepare for complainant's use in maintaining their error proceedings to the United States Supreme Court, from the judgment of your court dismissing their said action, a transcript of the record therein, containing the following papers and records, viz.,

Complainants' Original Bill.

The exhibit filed herewith containing joint wills of Moses Hubbard and also containing the late will of Mary Jane Hubbard.

The exhibits filed at date of hearing, to this bill containing the portions of probate proceedings relative to each of said wills.

And, the petition in case in Collin County, District Court.

The answers of defendants filed herein, and each of them.

The exhibits filed to said answers and each of said exhibits.

The interrogatories filed in your court on December 31, 1915, directed to the defendants, John H. L. C. English, and associates as trustees and to the County Depositary.

The answers to interrogatories filed in your said court, by said John H. L. C. English, as trustee; also of the Bank of County depositary; also of Rhea Gossett, Trustee of School District.

Also, the judgment given by the Court on June 1st, 1916, dismissing this bill in Equity.

Also, the certificate of the District Judge upon the question of jurisdiction, dated June 1st, 1916.

Also, Assignment of Errors.

Also Petition for allowance of appeal.

Also, Order allowing appeal.

Also Bond on Appeal.

Also, citation and proof of service thereon.

93 Also, this præcipe for record.

ALLEN G. FISHER,
WILLIAM P. ROONEY,
Solicitors for complainants,
Chadron, Nebraska.

94

Clerk's Certificate.

I, J. R. Blades, Clerk of the United States District Court for the Eastern District of Texas, in the Fifth Circuit and district aforesaid, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignment of errors, and all the proceedings in cause No. 47, wherein, Albert E. Sutton et al. are appellants and John H. C. L. English et al. are appellees, constituted and prepared in accordance with præcipe for transcript filed herein, as fully as the same remain on file and of record in my office at Sherman.

Witness my hand officially and the seal of said court, at Sherman, Texas, this the 23d day of November, A. D., 1916.

[Seal United States District Court, Eastern District of Texas.]

J. R. BLADES, *Clerk.*

By M. B. OSLIN, *Deputy.*

95 THE UNITED STATES OF AMERICA, ss:

To John H. L. C. English, F. S. Finney, J. T. Robinson, W. E. Foster, Superintendent of Public Instruction of Collins County, Texas, and District Number 67 in the county of Collin and State of Texas, a municipal corporation, Cora D. Spencer, and Robert L. Clayton, Greeting:

Q. You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the 6th day of December next, pursuant to an appeal filed in the clerks' office of the District Court of the United States for the Eastern District of Texas, wherein Albert E. Sutton, DeLana M. Sutton, Rachael E. Kirtley, Helen M. Marshall, Elizabeth E. Davis, George D. Sutton, and Ida Crickbaum are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against said appellants should not be corrected and speedy justice be done to the parties in that behalf.

Given under by hand at the city of Sherman, in the District above mentioned, this 25th day of October, in the year of our Lord, one thousand nine hundred and sixteen.

GORDON RUSSELL,

*Judge of the Circuit Court of the United
States for the Eastern District of Texas.*

Due, legal, and timely service of the foregoing citation upon each defendant, appellee, is admitted this 6th day of November, 1916.

W. R. ABERNATHY,

G. R. SMITH,

CECIL H. SMITH

CHARLES BATSELL,

*Solicitors and Attorneys for each
defendant, appellee.*

96 [Endorsed:] In the United States District Court, Eastern District of Texas, Sherman Division. Albert E. Sutton et al., complainants, v. John H. C. L. English et al., defendants. Citation and proof of service. Filed Nov. 6, 1916. J. R. Blades, Clerk.

97 In the Supreme Court of the United States.

ALBERT E. SUTTON, DELANA M. SUTTON, RACHEL E. KIRTLEY, Helen M. Marshall, Elizabeth E. Favid, George D. Sutton, and Ida Crickbaum, Complainants,

v.

JOHN H. L. C. ENGLISH, F. S. FINNEY, J. T. ROBINSON, W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, and District Number 67 in the County of Collin and State of Texas, a municipal corporation and Robert L. Clayton and Cora D. Sutton, Defendants.

It is hereby stipulated by and between the parties hereto through their separate counsel, that the record herein made and transmitted to this court from the district court of the Eastern District of Texas, Sherman Division, from the judgment of dismissal therein given on June 1st, 1916, and the assignments of error therein allowed, shall be deemed and taken as and for an appeal in equity presenting only the questions of the jurisdiction of the said Federal court, and the sufficiency of the bills of complaint as showing jurisdiction in such court, as fully as if the allowance thereof by the trial court had denominated this to be an appeal in equity. This is to waive only the use of the phrase petition for writ of error, by inadvertence of counsel for complainants, and save the expense of application for new appeal, and the incident delay.

ALBERT FISHER,

Chadron, Nebraska,

Attorney for Complainants, Solicitor.

CECIL H. SMITH,

Sherman, Texas,

Solicitor for Defendants.

[Endorsed:] In the Supreme Court of the United States. Albert E. Sutton et al., Complainants, v. John H. L. C. English et al., Defendants. Stipulation to docket record as and for appeal on question of jurisdiction.

Endorsed on cover: File No. 25,625. E. Texas, D. C. U. S. Term No. 795. Albert E. Sutton, Rachael E. Kirtley, Delana H. Sutton et al., Appellants, vs. John H. C. L. English et al. Filed November 27th, 1916. File No. 25,625.

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No. 795.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

ALBERT E. SUTTON, ET AL., APPELLANTS,

VS.

JOHN H. L. C. ENGLISH, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Albert E. Sutton, et al., appellants, plaintiffs below, filed this, a bill in equity, in the District Court of the United States for the Eastern District of Texas, at Sherman, August 14, 1915. John H. L. C. English, et al., appellees, defendants below, filed motions to dismiss in the nature of demurrers, and pleas to the jurisdiction of the court, to which were subjoined answers, on September 4, 1915.

The motions assailing the jurisdiction of the court were duly submitted, and on June 1, 1916, were sustained, and the bill dismissed for want of jurisdiction, and an appeal perfected direct to this court.

Plaintiffs' Bill in Equity.

Your petitioners respectfully show unto Your Honor that this action is a civil action wherein there is diversity of citizenship between the parties plaintiff and the parties defendant, and the amount in controversy is more than the sum of Five Thousand Dollars exclusive of interest and costs—being in fact the sum and amount of one hundred sixty-four thousand dollars and more, and the amount in controversy upon the part and in the behalf of each complainant is more than the sum of six thousand dollars. Your petitioners who are complainants, respectfully aver and show unto Your Honor, that the plaintiff, Albert E. Sutton, is a citizen, resident and inhabitant of Town of Kay-Cee in the County of Johnson, and State of Wyoming, and the plaintiff, DeLana M. Sutton, is a citizen, resident and inhabitant of the Town of Harrison, in the County of Sioux, and State of Nebraska, and the plaintiff, Rachael E. Kirtley is a citizen, resident and inhabitant of the City of Hot Springs, in Fall River County, and State of South Dakota, and the plaintiff, Helen M. Marshall, is a citizen, resident and inhabitant of the Town of Jerseyville, in the County of Jersey and the State of Illinois, and the plaintiff, Elizabeth E. Davis, is a citizen, resident and inhabitant of the Town of Harrison, County of Sioux, and State of Nebraska, and the plaintiff,

George D. Sutton is a citizen, resident and inhabitant of the Town of Jerseyville, and County of Jersey, and State of Illinois, and the plaintiff, Ida Krickbaum, is a citizen, resident and inhabitant of the City of Ft. Collins, and County of Larimer, and State of Colorado, and such residence, citizenship and inhabitancy prevailed at all the dates hereinafter mentioned, and prior to the seventh day of February, A. D., 1914.

And the plaintiffs allege further that now, and at all the dates hereinafter mentioned and prior to the seventh day of February, A. D., 1914, each Robert L. Clayton, and F. S. Finley and J. T. Robinson, and John H. L. C. English was a citizen, resident and inhabitant of the Town of Celina, in Collin County, and State of Texas, and W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, was a resident, citizen and inhabitant of the City of McKinney and County of Collin, and State of Texas, and Cora D. Spencer was a citizen, resident and inhabitant of Weston, in the said county of Collin and State of Texas, and the defendant District Trustees of District Number 67, in the County of Collin and State of Texas, is a municipal corporation in and for the said district and the County of Collin and State of Texas, and each and every of the said defendants is within the Sherman division of the Eastern District of the State of Texas.

And petitioners allege that this action is for the construction of a will whereunder plaintiffs claim an inheritance in lands within the counties of Collin and Den-

ton in the said division district and state of Texas; and for an accounting by the said defendants English and Finley and Robertson and the quieting of title in plaintiffs to said real estate and to personal property in the possession of the said defendant English and all within the counties of Collin and Denton, in said division, district and state.

Your petitioners allege that the interest of each plaintiff in the subject of controversy, which is hereinafter described, arises out of the following circumstances: That about 1866, Moses Hubbard and Mary Jane Hubbard, husband and wife, settled on a parcel of the real estate hereinafter described, in Collin County, Texas, and from that time continuously until the dates of their respective deaths, each lived as a citizen, resident and inhabitant of the said county and state, and during their joint life time they lived and cohabited together as husband and wife and as one family until the said Moses Hubbard departed this life on May 26, 1906, leaving him surviving, the said Mary Jane Hubbard, his wife, and no descendant and no other heir. And the said Mary Jane Hubbard of the said county and state, departed this life on February 7, 1914. That at the time of the death of the said Mary Jane Hubbard, she left no children nor husband, but she left surviving: Rachael E. Kirtley, and Albert E. Sutton, and DeLana M. Sutton, her brothers; and she left also surviving her the children of a deceased brother, Lewis Sutton, and the names of the said children who survived the said Mary Jane Hubbard were:

Cora D. Spencer, Elizabeth E. Davis, Ida. Krickbaum, George D. Sutton and Lewis Sutton, Jr. And that the said Lewis Sutton, Jr., departed this life intestate at Jersey County, Illinois, on September 2, 1914, unmarried and without descendants; and left as descendants his mother, Helen M. Marshall, and his sisters, the said Cora D. Spencer, Elizabeth E. Davis and Ida Krickbaum, and one brother, Geo. D. Sutton; and these last are the only heirs at law of the said Mary Jane Hubbard and Moses Hubbard.

That the said Moses Hubbard and Mary Jane Hubbard, husband and wife, at the time when they domiciled thus in Collin County, Texas, were entirely without means or property; and by their joint labors and earnings and saving, they had accumulated as community property, belonging to them, the real estate hereinafter described, in the sum of about 983 acres, and also their household and kitchen furniture, and cow and calf, which was exempt together with the homestead of 200 acres; and also personal property owned by the said community, consisting of notes and shares of the capital stock of the Celina Mill and Elevator Company, all in Collin County; and shares of capital stock of the Pilot Point National Bank, Denton County, Texas; and shares of stock in the D. C. Telephone Company, which community was of about the value of \$100,000.00.

That there had been born unto the said Moses Hubbard and Mary Jane Hubbard, one daughter and no other child, and the said daughter had pre-deceased her said

father and mother, and she left no descendants. By reason of the said community property in its general characteristics of the matter of an estate by entireties; and the whole and every portion thereof descended unto the survivor of the said community, the said Mary Jane Hubbard.

Plaintiffs allege further that the said Mary Jane Hubbard had accumulated in addition to the said community property, which was hers, separate property by her own exertions amounting in value to about \$18,000, consisting of a dwelling house and the ground whereon the same stood; and notes and household goods and jewelry; and stock in two banks and money on deposit in a bank.

Plaintiffs state further that at the time of the last sickness of the said Mary Jane Hubbard, and while she was in the very article of death and then almost 71 years of age, in the absence of the plaintiffs from her death-bed side and without their knowledge or procurement, she was persuaded and influenced into the execution of an instrument in the form of a will wherein and whereby she purported to dispose of the accumulations and separate property of herself. A copy of said will is filed herewith and marked exhibit "A" to this bill and is made a part hereto by the said identification; and prayed to be deemed and taken as a part of this bill, as fully as if the same were included and set out at length herein. And plaintiffs say that there was no reference or mention in said purported will of any plaintiff except Ra-

chael E. Kirtley, who consents that the said purported will may be voided and held of none effect, and offers hereby to throw into Hotch-Potch the bequest unto her, which consists of 20 shares of the capital stock of the Celina State Bank. And the plaintiffs say that on February 5, 1914, when the said writing was made, the said Mary Jane Hubbard was clouded in her intellect; and that she was not of sound or disposing mind or memory; and that she did not remember the plaintiffs except the said Rachael E. Kirtley, although she desired and intended so to do. That the name of said plaintiff was not remembered by said Mary Jane Hubbard, but was suggested by John H. L. C. English, as also every other item thereof. And that her mind and memory at the time of signing the purported will was weak and imbecile to the extent that she did not comprehend the contents of it; and that she was induced to sign the same by the undue influence of the defendant English, by purpose and through motives of his own. And that the same ought to be annulled and set aside and held for naught; nevertheless, these plaintiffs do not desire to interfere with the distribution made by the defendant, Clayton, purporting to act as executor of said will, but they bring this bill for the purpose of having it annulled to the extent only that the 12th paragraph, which is in the words and figures following, to-wit:

12. I give and bequeath all the residue of my property that has not been bequeathed, to my loving niece, Cora D. Spencer, to have and to hold forever; be de-

creed and determined for ever more, not to be a testamentary disposition of that portion of her separate estate, which had once been community estate of the said Moses Hubbard and Mary Jane Hubbard; and that the said community property should be held and decreed to pass unto the plaintiffs in the proportions hereinafter described, pursuant to the provisions of Article 3235 of the Civil Statutes of the State of Texas, as estate which is not divided or bequeathed, and by reason whereof should be divided immediately to the plaintiffs in the following proportions:

Unto Rachael E. Kirtley, $\frac{1}{4}$; to Albert E. Sutton, $\frac{1}{4}$; to DeLana M. Sutton, $\frac{1}{4}$; to Elizabeth E. Davis, $\frac{1}{16}$; to Ida Krickbaum, $\frac{1}{16}$; to Helen M. Marshall, $\frac{1}{16}$, *to Geo. D. Sutton, $\frac{1}{16}$.*

The plaintiffs allege further that for many years prior to her said decease, the said Mary Jane Hubbard was not stable in her actions or determinations; and not fully mistress of herself, nor her acts nor property; but that she was unduly influenced by and was absolutely subject to the control of the defendant English, who managed and controlled and dictated to her concerning her property and proceeds thereof, without regard to her will or her interest; and compelled her to submit to his control, and substituted his will for hers in many actions for a long period of years, and in truth and in fact, he exercised such malignant control during his lifetime over the said Moses Hubbard, which influence was actuated by his fostering and encouraging and catering to a mania

of the said Moses Hubbard in his lifetime, and his adjurations relative thereto after the death of said Moses Hubbard, were imposed and coerced upon the mind of the said Mary Jane Hubbard and overpowering her will and wish in relation to the said community property.

The plaintiffs allege that the said Moses Hubbard was subject to a mania or unsound idea relative to the memory of his deceased daughter, Alla Hubbard Spencer, and was controlled thereby in his investments and transactions; that he spent a considerable amount of money to procure the manufacture of a brand of flour called the Alla Brand, by the Celina Mill and Elevator Company. And that he erected a cheap building for school purposes within the limits of Roseland, District 67, whose trustees are defendants herein, and did other acts in pursuit of the same delusion. And that he attempted a disposal of the community property of his said wife by a purported will, which was executed by him after he was 71 years of age, in the year 1897, a copy of which will, marked exhibit "B" to this bill is filed herewith, and prayed to be taken as a portion of this bill and paragraph as though set out here in words; and by the terms whereof it was attempted to establish and create in said community property after it should become separate property of Mary Jane Hubbard, a charitable trust, in perpetuity for the claims therein, described in the following language:

"We have founded an institution for increase and diffusion of knowledge, which we have named Alla, and

which, shall remain permanently located on the same survey on which it is located, to-wit: Wade H. Rattan, and it is our desire that the trustees herein provided for, shall use the available fund in the employment of teachers, erection of proper and necessary buildings, the purchase of apparatus, and other germane uses; and desire that at this school or institution of learning, all children whose parents are Caucasian and of the white race, and over the age of 6 and under the age of 21, shall be admitted free of tuition; but in case more apply than the funds will justify, then the trustees in determining who shall be admitted, are requested to give preference to worthy students who have been in attendance before, and those residing in the school district or adjacent thereto."

Plaintiffs allege further that the said trust is void because it is indefinite as to parties beneficiary; and because the maker of the said will had established no institution and none was in existence except the defendant district; and because it was beyond the power of the defendants named as trustees, to admit or compel or procure the attendance therein of non-resident scholars who are beyond scholastic age; and for the further reason that Mary Jane Hubbard and Moses Hubbard were constituted therein as intermediate beneficiaries, ahead of said trust and for the further reason that the said Moses Hubbard was not of sound and disposing mind and memory; and for the further principal reason that the said purported will did not contain language whereby any

gift or devise or bequest or conveyance was made and because the property therein referred to was all community property, whereof the survivor was to become and did become sole owner and possess, free from the testamentary disposition if any was made; but in fact none was made by the said Moses Hubbard.

And plaintiffs say that if the said instrument had any effect in law, which these plaintiffs declare was not had thereby, then there was created a naked trust, whereof the said Mary Jane Hubbard was sole beneficiary and the persons named therein defendants, who claim to be trustees, had no interest and by the law of the land the trust was executed and determined, in, and for the sole benefit of, the said Mary Jane Hubbard.

Plaintiffs allege further that the defendants trustee never sought a settlement with the executors over the purported will and never received from nor receipted thereunder unto the said executors for any of the property and they never, until the proceedings hereinafter related, made claim to any person related, nor at any time as trustee, but all of them attempted to make private use of the said property, both real and personal, without authority either in law or in equity; and to convert the property and the proceedings thereof, unto the private use and benefit of the said defendant English, and to that end conveyed and converted a portion of the said personal property into real estate, whereof he took the title unto himself, through the said conversion *ex maleficio* of 515.18 acres located in the County of Denton

and State of Texas aforesaid. (Fully described by metes and bounds.)

Plaintiffs allege further that afterwards, in an attempt to increase his possessions and control, the said English, nominally joining with himself the other defendants herein named and claiming to be trustees, to-wit: John H. L. C. English, J. T. Robinson, F. S. Finley and W. E. Foster, signed in the District Court, Collin County, Texas, a petition, which petition was filed on January 11, 1913, wherein was alleged that the will hereinbefore referred to, marked Exhibit "B" was a joint will, "under a compact, agreement and contract" mutually binding on each, and the same after the death of the said Moses Hubbard; and the purporting of the said will was irrevocable by either the said Moses Hubbard or Mary Jane Hubbard; and also "that under the premises of said will, the said Mary Jane Hubbard received rights and emoluments and privileges, which she would not have had but for the said will; that the said Mary Jane Hubbard accepted under said will and has at all times since the probating thereof accepted and exercised those rights, privileges and emoluments; and by reason of the premises, said will is irrevocable by the said Mary Jane Hubbard," and alleging that a trust was created by said will in behalf of the said English, Finley, Robinson and Foster; and prayed for citation thereon and judgment for the title to the premises, therefore that a trust be declared in their favor; but these plaintiffs allege that no citation was issued and the said Mary Jane Hubbard had no

notice of the said actions nor proceedings in the premises and that she was deceived, as plaintiffs are informed, into signing a purported waiver and disclaimer therein, but the same was without the knowledge or understanding of the said Mary Jane Hubbard, and by chicane and deceit; and was wholly without consideration and was void because it was a misuse of the forms of law; and the judgment was never given nor signed by any judge or person possessing judicial power, within the State of Texas.

And especially by reason of the fact that the said petition was in effect both in law and in equity an application for the construction of the said paper as the will of Moses Hubbard, whereof the District Court had not jurisdiction in the first instance, and for which construction of which said instrument there was then and yet pending in the county probate court of Collin County, Texas, a petition signed by the said purported trustees whereupon the judgment of the said County Court will, and would be binding and exclusive upon said purported trustees, without and beyond, and free from the assumption of power in the District Court of said County. And, moreover the person who assumed to act as judge for that cause was without power or authority, for the reasons stated above which also prevailed in relation to said Mary Jane Hubbard in her signature, as to his selection, on her part. And plaintiff says that the real estate originally usurped and taken possession of by the said John H. L. C. English, is properly described as follows:

(Here follows a full description of seven tracts of land, containing nine hundred ninety-three (993) acres.)

And the personal property thereunder is described more particularly as follows:

(A full description of shares of stock and evidences of debt of the value of \$13,656.98.)

And plaintiff says the said John H. L. C. English has rented the said lands and converted to his own individual benefit and use, the use and occupation thereof which has been of the fair annual profit and value of six thousand dollars, and for this sum annually the plaintiffs are entitled to charge the said English herein, together with the earnings or interest thereon, from the date when he assumed possession thereof.

And plaintiff says that the plaintiffs, and each of them is wholly without a remedy under the strict rules of the common law, and each of them can only obtain adequate relief in a court of conscience. Wherefore, each complainant prays that an accounting be had between the said defendants, English, Finley, Robinson and Foster, and each of them, concerning the rents, issues and profits and income of all of said real estate and personal property, and that the said instrument signed by Moses Hubbard and Mary Jane Hubbard, of date January 5th, 1897, and every purported claim, judgment or right based thereupon be set aside and held for naught—that the supposed will signed by Mary Jane Hubbard and the clause 12 therein, dated February 5th, 1914, be cancelled and set aside and annulled, and held of no effect—that the title

in and to all the property in the foregoing bill of complaint be decreed to be, as also all the earnings and rentals thereof, the property of the said plaintiffs herein as heirs at law of the intestate property of Mary Jane Hubbard, deceased, and that the same be partitioned between the said heirs at law as their relative proportion therein be found and determined, which they pray may be done herein; and for such other and further relief as may appear to be just and equitable.

And each plaintiff prays for process of subpoena herein to the marshal of said court against each defendant named above to be served within this division.

(The petition is duly verified by plaintiffs.)

The following exhibits were filed to said bill in equity:

1. Will of Mary Jane Hubbard.

I, Mrs. Mary Jane Hubbard, of the County of Collin and State of Texas, being of sound and disposing mind and memory, and being desirous to settle my worldly affairs while I have strength to do so, do make this my last will, and testament, hereby revoking all others heretofore by me made.

1st. I desire and direct that my body be buried in a decent and christian like manner, suitable to my circumstances and condition in life.

2nd. I desire and direct that my just debts be paid out of my estate without delay, by my executor to be hereinafter appointed.

3rd. I give and bequeath to my beloved niece Cora D. Spencer my home in the Town of Celina, same being lots Nos. 13-14 & 15, in Block 17, to have and to hold unto her the said Cora D. Spencer, in fee simple forever.

4th. I give and bequeath to my friend, Mrs. Sarah E. Neeley, three shares of Bank stock in the First National Bank of Celina, to have and to hold the same together with the profits and income there unto her the said Sarah E. Neeley, in fee simple forever.

5th. I give and bequeath to my loving sister Mrs. Rachael E. Kirtley my twenty shares of Bank Stock in the Celina State Bank, to have and to hold the same unto her, the said Rachael E. Kirtley, together with the profits and income thereof in fee simple forever.

6th. I give and bequeath to my loving niece, Miss Mary Emma English, One Thousand (\$1000.00) Dollars, in land notes, to have and to hold the same to her, the said Mary Emma English, forever.

7th. I give and bequeath to my esteemed friend, Mrs. Sarah E. Neeley, Five Hundred (\$500.00) Dollars in land notes, to have and to hold the same unto her, the said Sarah E. Neeley, forever.

8th. I give and bequeath to my loving nephew, Frank S. Spencer, Fifteen Hundred (\$1500.00) Dollars worth of land notes, to have and to hold the same unto him, the said Frank S. Spencer, forever.

9th. I give and bequeath to my loving niece, Mrs. Alla Hubbard, Five Hundred (\$500.00) Dollars, to have and to hold the same unto her, the said Alla Hubbard Farnsworth, forever.

10th. I give and bequeath to little Miss Lorine Neeley Five Hundred (\$500.00) Dollars, to have and to hold unto her the said Lorine Neeley forever. And it is my wish and I so direct that Sarah E. Neeley, mother of little Miss Lorine, have charge of said \$500.00 and manage same to the best interest of little Lorine, and pay the same to her, together with the income thereof, when she arrives at the age of twenty-one years, or marries.

11th. I give and bequeath to my loving niece, Mrs. Cora D. Spencer, all my household goods and furnishings, to have and to hold the same unto her, the said Cora D. Spencer, forever.

12th. I give and bequeath all the residue of my property that has not been bequeathed, including my jewelry, to my loving niece, Mrs. Cora D. Spencer, to have and to hold to her in fee simple, forever.

13th. And lastly, I do nominate and appoint R. L. Clayton to be the executor of this, my last will and testament.

In testimony whereof, I have hereunto set my hand this the 5th day of February, A. D. 1914.

Mary Jane Hubbard.

Signed, declared and published by Mrs. Mary Jane Hubbard, as her last will and testament, in the presence of us, the attesting witnesses, who have hereto subscribed our names in the presence of said Mrs. Mary Jane Hubbard, at her special instance and request, this the 5th day of Feb., A. D. 1914.

J. H. L. C. English,
M. Button,
J. T. Buchanan."

2. **Will of Moses and Mary Jane Hubbard.**

"STATE OF TEXAS :

IN THE NAME OF GOD: AMEN.

COUNTY OF COLLIN :

We, Moses Hubbard and Mary Jane Hubbard, of Collin County, being of sound mind and disposing memory, mindful of the uncertainty of life and the certainty of death, wishing to dispose of the effects it has pleased Almighty God to bless us with while we have strength of mind and body so to do, do make, publish and declare this to be the last will and testament of us, and each of us, hereby revoking all others by us made, and we each direct that as each of us die this instrument shall be probated as the will of such deceased person.

Item 1st. We commend our spirits to God who gave them, and our bodies to the dust whence they came, directing our executors in this will to give us each decent burial and to erect for us a monument commensurate and suitable to our means and station in life.

Item 2nd. It is our desire and that of each of us, that as each of us dies, all the property then owned by us shall descend and vest in the following named persons, and their successors in this trust, to-wit: J. H. L. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the superintendent of Public Instruction for Collin County, who shall take and hold all the property real, personal and mixed, owned by us at the death of either of us, for the purposes, uses and trusts and as hereinafter directed and vacancies in whose number shall be filled as herein directed.

Item 3rd. Upon the death of either of us the trustees shall receive the rents, revenues and profits arising from all of said property, and shall lend all moneys having same well secured, or invest same in interest bearing bonds, rent the lands. One half the net proceeds shall be paid to any person and in any manner and for any purpose the survivor may direct. The other half shall be used and paid out in the same manner and for the same purpose as the rents and revenues of the property are herein directed to be paid and appropriated after the death of both of us, but the survivor has the right during lifetime to determine the specific manner of expenditure, that is, whether it shall be used in employment of teachers, erection of building, purchase of apparatus or other germane uses, etc.

Item 4th. Upon the death of both of us the trustees herein provided for shall take and hold all the property herein bequeathed which shall constitute and be divided into two funds, one of which shall be a permanent fund, and which shall not be lessened or diminished in any manner or for any purpose. The other fund shall be the available fund and may be expended, used and applied as directed herein. The permanent fund under this instrument shall consist of all of our real estate, stocks, notes, and cash and such additions as under the provisions of this will, may from time to time be added thereto. The additions to the permanent fund shall come from the rents, revenues, profits and interest arising from the permanent fund, and shall in no year be less than one third, but on

an average shall be one half of such rents, revenues, profits and interests, and the balance of the rents, revenues, profits and interest shall be set aside and used as an available fund.

Item 5th. Believing that we have the love of God in our hearts for the manifold blessings he has bestowed upon us, and desiring to add to the happiness and improvement of our neighbors we have founded an institution for increase and diffusion of knowledge, which we have named "ALLA," and which shall remain permanently located on the same survey on which it is located, to-wit: Wade H. Rattan, and it is our desire that the Trustees herein provided for shall use the available fund herein provided for in the employment of teachers, erection of proper and necessary buildings, the purchase of apparatus and other germane uses, and it is our desire that at this school or institution of learning all children whose parents are Caucasian and of the white race, and who are over the age of six and under the age of twenty-one shall be admitted free of tuition, but in case more apply than the funds on hand justify, then the Trustees in determining who shall be admitted are requested to give preference to worthy students who have been in attendance before residing in the school district, or adjacent thereto. The term "germane uses" is intended to receive a liberal construction, and to authorize the use of all means deemed proper by the Trustees for diffusion of knowledge, but we do not desire a sectarian school taught. The Holy Bible may be used, and we pray may be the rule and guide of both instructors and pupil.

Item 6th. The Trustees shall have no power to sell or alienate the real estate devised herein, but it shall be preserved and its rents, revenues be applied for the charitable uses, but should it be determined by the judgment of the court of competent jurisdiction after a *bona fide* trial in which nothing must be agreed upon that this limitation is invalid, then and only in that event we direct the Trustees to sell said lands and hold the proceeds as part of the permanent fund; it is however our wish that the lands shall never be sold if it be legal to hold them as here provided.

Item 7th. Confiding in the honor and integrity of J. H. L. C. English, Dr. B. F. Spencer, Dan P. English and F. S. Finley, and the person who may be Superintendent of Public Instruction for Collin County, Texas, we appoint Trustees of this fund and executors of each of our will.

Item 8th. Should we survive any of the executors or Trustee, the majority of those living may fill out by election their number to complete the number contemplated by this instrument which is five (5) and in case of death or refusal to act of any of the number at any time either at our death or at any time, the majority may fill vacancies, but the trustees must be residents of Collin County, Texas, it being our intention to create a perpetual body to this end the trustees may, if advised that it would better advance the purposes herein intended incorporate under the name of "ALLA"; no stock shall be issued.

Item 9th. It is our desire that the Trustees herein provided for, to-wit: J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the Superintendent of Public Instruction for Collin County, Texas, be not required to give bond, it is further our desire that no one be elected or act as Trustee who is not a resident of Collin County, Texas, and that a change of residence from Collin County, Texas, shall be cause for removal from Trusteeship, and the proper court is authorized and requested to require bond of subsequent Trustees, if deemed best for preservation of fund.

Item 10th. The Trustees shall have no power ever to create any debt and shall make no purchases or contract a liability beyond a present ability to pay cash.

Item 11th. It is our desire that no further action be had in the county in reference to the settlement of our estates than the probating this will of each of us, the return of an inventory and appraisement and list of claims.

Witness our hands this 5th day of January, 1897, in the presence of S. T. Cunningham, J. E. Kerr, C. E. Francis, C. B. Fields, W. A. Gossett and W. E. Francis whom we request to sign as attesting witnesses to this, our last will and testament.

Moses Hubbard,
Mary Jane Hubbard.

Witnesses:

S. T. Cunningham,
J. E. Kerr,
C. E. Francis,
C. B. Fields,
W. A. Gossett,
W. E. Francis."

3. An exhibit of the oath and bond of defendant, R. L. Clayton, executor of the will of Mary Jane Hubbard, and the inventory of her estate approved May 25, 1914, showing an estate of the appraised value of sixteen thousand one hundred ninety-four and 08/100 dollars (\$16,194.08), filed in the County Court of Collin County, Texas.

4. Petition to probate the will of Moses Hubbard and Mary Jane Hubbard.

"The State of Texas, County of Collin.

*In the County Court of Collin County, Texas, July Term,
A. D., 1906.*

To the Hon. County Court of Collin County:

Now comes your petitioners, J. H. L. C. English, B. F. Spencer and F. S. Finley, J. T. Robinson, W. L. Yarbrough, and would respectfully show to your Hon. Court that Moses Hubbard departed this life in Collin County, Texas, on and about the 26th day of May, 1906; that prior to his death the said Moses Hubbard had resided in Collin County, for the space and period of about 40 years; that he owned property situated in Collin County, Texas, consisting of lands and personal property of the value of about sixty thousand dollars. Petitioners would further show that the said Moses Hubbard left a will which is herewith filed in which he nominated J. H. L. C. English, B. F. Spencer, Dan F. English, F. S. Finley, and the Superintendent of Public Instruction as executors of his will; that he provided in his will that the said executors should be residents of Collin County,

Texas; that the said Dan P. English has removed from Collin County and the said will provided that the majority of the executors should have power to fill vacancies; that said executors have nominated and appointed J. T. Robinson in the place of Dan P. English.

These petitioners would further show to the court that it was the intent and purpose of the said Moses Hubbard and of the said Mary Jane Hubbard, his wife, who also joined in the execution of the will, that they should make a joint will which should be probated at the death of each of them, and that by the terms of the will and the intent of the will the personal property on hand at the death of either of them should vest in the survivor and that upon the death of the survivor the personal property then on hand should be imposed with the trust created by the will. That a question having arisen among them these executors pray that the will be now construed and that the court in the order probating the will construe the same and give them directions as to the disposal of the personal property, and in the execution of their trust.

Your petitioners therefore pray that all proper notices be given that upon hearing said will be probated, and that the court construe the will that no bond be required of them, as the will exempts them from bond and that no further action be had except to construe return an inventory and appraisalment and list of claims and probate said will.

ABERNATHY & ABERNATHY,
Attorneys for Petitioners.

Filed June 12, 1906, W. M. Shirley, Clerk County Court, Collin County, Texas, by G. E. Strother, Deputy."

To which is attached the inventory of the estate devised by said last mentioned will, approved November 2, 1906, showing an estate of the appraised value of sixty-one thousand, four hundred eighty-six and 98/100 dollars (\$61,486.98).

5. Petition of defendant executors to remove cloud.

"State of Texas, County of Collin.

In the District Court of Collin County, Texas, February Term, 1913.

To Honorable J. M. Pearson, Judge of said Court:

Now comes J. H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, Trustees of Alla School Fund, hereinafter styled plaintiffs, complaining of the Christian University and Mary Jane Hubbard, hereinafter styled defendants, and represent:

That plaintiffs all reside in Collin County, Texas, and sue in their fiduciary capacity as Trustees of Alla and Alla Fund.

They further represent that Alla is an exclusive, educational and charitable institution, and is unincorporated; that the defendant, the Texas Christian University is a corporation, duly incorporated under the laws of the State of Texas, having its principal office and place of business at Ft. Worth, Texas, in Tarrant County; and that F. D. Kershner of Tarrant County, Texas, is its president.

That the defendant, Mary Jane Hubbard, resides in Collin County, Texas.

That heretofore, to-wit, on the 20th day of June, 1912, the plaintiffs were in possession of the following described property, to-wit:

(Here follows a description of field notes of the lands described in plaintiffs' bill.)

That plaintiffs, in their fiduciary capacity as hereinbefore stated, were the owners of all of said property in fee simple; that the defendants unlawfully entered upon and dispossessed plaintiffs of such premises on, to-wit, the 20th day of June, 1912, and withholds from them the possession thereof.

That the defendant, the Texas Christian University, is asserting some kind of a claim to the property which casts a cloud upon plaintiffs' title. Plaintiffs here expressly disclaim any intention of pleading their title to said property, but one link in the chain of title is a joint and mutual will of Moses Hubbard and Mary Jane Hubbard; that Moses Hubbard departed this life about May, 1906; that said will was duly filed and probated about June, 1906, a copy of which is hereto attached and marked 'Exhibit A.' That said joint will was duly executed by the said Moses Hubbard and his wife, Mary Jane Hubbard, defendant herein, under a compact, agreement and contract mutually binding upon each, and the same, after the death of the said Moses Hubbard and the probating of said will, was irrevocable by either Moses Hubbard or Mary Jane Hubbard.

That under the premises of said will the said Mary Jane Hubbard received rights, emoluments and privileges

which she would not have had but for said will; that the said Mary Jane Hubbard accepted under said will and has at all times since the probating thereof accepted and exercised those rights, privileges and emoluments, and by reason of the premises said will is irrevocable by the said Mary Jane Hubbard.

But if mistaken in the foregoing allegation, then by reason of the premises and by reason of the fact that said will was irrevocable a trust was created in behalf of the plaintiffs herein for the use and enjoyments of said premises, subject to the limitations, conditions and restrictions mentioned in the certified copy of said will hereto attached.

Wherefore plaintiffs pray that citation issue requiring the defendants to appear and answer herein and that upon final hearing plaintiffs have judgment for the title to said premises herein sued for, and that the cloud be removed from their title by reason of claims of plaintiffs herein and that the trust be declared in the plaintiffs subject to the limitations and restrictions mentioned in said will.

Plaintiffs further pray for all general, special and equitable relief.

G. R. SMITH,
W. R. ABERNATHY,
Attorneys for Plaintiffs."

(To which is attached the joint will of Moses and Mary Jane Hubbard, a copy of which is attached as Exhibit 2 to plaintiffs' bill.) Which petition was filed in the District Court of Collin County, January 11, 1913, and the suit styled *J. H. L. C. English, et al., v. Texas Christian University, et al.*

Motions Questioning Jurisdiction and Answers of Defendants.

"Now come the defendants, John H. L. C. English, F. S. Finley, J. T. Robinson, W. E. Foster and District Trustees of District No. 67 in Collin County, Texas, and represent and show to the court :

First.

That there is a misjoinder of causes of action as set forth in plaintiffs' bill in the following respects, to-wit :

Said bill shows upon its face that the same is a bill to contest the will of Moses Hubbard, dated January 5th, 1897, and by virtue of which John H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, as Trustees, and District Trustees of District No. 67, hold the lands described in plaintiffs' petition and the rents and revenues derived therefrom, less the amounts paid Mary Jane Hubbard in her lifetime for the Alla School, and that defendants Cora D. Spencer and Robert L. Clayton have no interest whatever in that subject of litigation, and that the liability is not one asserted against Cora D. Spencer and Robert L. Clayton, but against said defendants' Trustees, and District solely, and that said bill is also brought for the purpose of annulling and setting aside the probate of the will of Mary Jane Hubbard, under and by virtue of which the defendant Cora D. Spencer as residuary legatee became the owner of certain real estate and personal property, and that the defendants' Trustees and District hereinbefore named, are in no way liable on any feature of the bill.

That the rights and interests of Cora D. Spencer can in no manner be affected by the setting aside and annulling the probate of the will of Moses Hubbard, and the rights and liabilities of said defendants, as Trustees, and said District, can in no manner be affected by setting aside the probate of the will of Mary Jane Hubbard, deceased, wherein Cora D. Spencer is legatee.

Wherefore said defendants move the court to dismiss this action for misjoinder of causes.

Second.

Said defendants herein move the court to dismiss this cause of action for misjoinder of parties defendant, it appearing from the face of the bill that the defendants' trustees and said District hereinabove named, have no interest in the probating or the annulling of the will of the said Mary Jane Hubbard as sought by said bill, and that defendants, Cora D. Spencer and Robert L. Clayton, have no interest in the probating or annulling the probate of the will of Moses Hubbard, deceased. Wherefore defendants pray the court to dismiss the bill for misjoinder of parties defendant.

Third.

This bill is brought for the purpose of contesting the probate of the will of Moses Hubbard, deceased, and for the purpose of contesting, annulling and setting aside the probate of the will of Mary Jane Hubbard, deceased.

Said defendants represent and show to the court that heretofore, on to-wit: the day of.....

A. D., 1906, the last will and testament of Moses Hubbard was admitted to probate in the County Court of Collin County, Texas. That said County Court of Collin County, Texas, sitting as a probate court, had jurisdiction of the subject matter and of the estate and duly admitted to probate as the last will and testament, the will of Moses Hubbard, deceased, a copy of which is filed as an exhibit with complainants' bill.

That heretofore, to-wit, on the day of, A. D., 1914, the County Court of Collin County, Texas, sitting at probate, admitted to probate the last will and testament of Mary Jane Hubbard, an instrument a copy of which is attached to the exhibit filed by complainants with their bill herein.

That the County Court of Collin County, Texas, has and had the exclusive jurisdiction in all probate matters, and that said court of Collin County, Texas, sitting at probate is the only court having original jurisdiction to hear and try any contest of the probate of either of said wills.

That there is no statute of the State of Texas, to authorize any court of general jurisdiction to entertain original jurisdiction of the contest of either of said wills, and that all proceedings in said court of original probate jurisdiction or proceedings *in rem* are binding upon the whole world, whether parties thereto or not.

Wherefore said defendants say that this court has not jurisdiction to hear and determine this matter, but that the County Court of Collin County, Texas, has the

exclusive original jurisdiction to hear and determine the contest of said will.

Wherefore they pray this court that this cause be dismissed for the want of jurisdiction.

Fourth.

The plaintiffs' bill shows upon its face that there is not that diversity of citizenship as will give this court jurisdiction of the subject matter in this:

It seeks for a partition of the property described in said bill and it appears from the allegations of the bill that the defendant, Cora D. Spencer, is entitled to a distributive share of any sum or sums which plaintiff might recover therein.

The petition alleging that complainants in the case are non-residents of the State of Texas, and also alleges that Cora D. Spencer is a resident citizen of Collin County, Texas, said petition alleging that complainants, Albert E. Sutton, DeLana M. Sutton and Rachael E. Kirtley, are the brothers and sisters of Mary Jane Hubbard, deceased, and are each entitled to $\frac{1}{4}$ distributive interest in her estate.

Said petition further alleging that Elizabeth E. Davis, George D. Sutton and Ida Krickbaum, and the defendant, Cora D. Spencer, are the children of a deceased brother of Mary Jane Hubbard, and as such each would be entitled to a $\frac{1}{16}$ distributive interest in any sum or sums that plaintiffs may recover herein.

Wherefore said defendants say that said petition shows upon its face that there is not that diversity of

citizenship as would give this court jurisdiction. They pray this court to dismiss this cause for the want of jurisdiction, it appearing that there is no diversity of citizenship.

Fifth.

And for answer herein these defendants each deny that there is such a diversity of citizenship between the parties interest(ed) herein as would give this court jurisdiction.

These defendants deny that the amount in controversy is one hundred and sixty-four Thousand dollars. These defendants deny that the amount in controversy on the part and behalf of each complainant is as much as six thousand dollars.

These defendants deny that this action is for the construction of a will, but they aver on the contrary it is an action to contest the validity of the will of Moses Hubbard and the will of Mary Jane Hubbard, and that it is a partition suit in which they seek to recover for and on behalf of the plaintiffs who were non-residents of the State, and defendant, Cora D. Spencer, against the defendants' trustees and District hereinabove mentioned.

Said defendants deny that any of the complainants or the defendant, Cora D. Spencer, are the heirs at law of Moses Hubbard. Defendants deny that Moses Hubbard was entirely without means or property when he settled in Collin County, Texas, but on the contrary aver that at the time of his marriage and subsequent thereto he acquired a large amount of property by gift, demise

and descent, and the same was under the laws of Texas his separate property; and defendants deny that all of the property described in plaintiffs' petition was the community property of Moses Hubbard and Mary Jane Hubbard.

Defendants deny that the community estate was of the value of one hundred thousand dollars. Defendants deny that the personal property consisting of notes, stock, etc. was of the value of one hundred thousand dollars. Defendants deny that the community property of Moses Hubbard descended unto the community survivor the said Mary Jane Hubbard, but on the contrary defendants aver that on, to-wit, about the day of, A. D., 1897, the said Moses Hubbard and Mary Jane Hubbard made and published their joint will, a copy of which is attached to the exhibit filed with complainants' bill. That by the terms of said will said Moses Hubbard and Mary Jane Hubbard devised and bequeathed their entire estate, both community and separate, to the defendants' trustees and District herein and their successors, all of the real and personal estate belonging to each and both of them, reserving to the survivor one-half of the revenue arising therefrom, directing that said trustees take possession of all of said property, real and personal, rent the same out and collect the rents, paying to the survivor one-half of the same for his own use and benefit, and providing that the other one-half should go for the purpose and maintenance of a Charitable Institution of learning known as Alla School, and pro-

viding that the survivor might direct how the other one-half of said proceeds should be spent, whether for the paying of teachers, erecting of buildings, or purchase of equipments.

That said will after the death of Moses Hubbard was duly probated in the County Court of Collin County, Texas, said court having jurisdiction of the parties and subject matter, and that the survivor, Mary Jane Hubbard, acquiesced in said probate and procured the probate thereof and accepted it under said will and received benefits, emoluments, rights and privileges that she would not have had but for said will, and she exercised said rights, privileges, etc. by reason whereof said will insofar as Mary Jane Hubbard was concerned was irrevocable.

Defendants deny that at the time Mary J. Hubbard executed the will disposing of the property acquired after the death of Moses Hubbard, which complainants seek to contest in this suit, and while she was in the very article of death, made and executed said will. Plaintiffs deny that she, the said Mary Jane Hubbard, was persuaded and influenced into the execution of said will, but on the contrary say that the said Mary Jane Hubbard at the time of the execution of said will was of sound, disposing mind and memory, and that she was a woman far above the ordinary in educational attainments, a woman of excellent sense and judgment, and in all respects fully capacitated to comprehend and know the extent and value of her estate, the objects of her bounty, and to remember each and every relative, especially the complainants herein.

Plaintiffs further aver that the disposition by the said Mary Jane Hubbard of her said property in said will, was a reasonable and natural disposition. Defendants deny that at the time of the execution of said will, the said Mary Jane Hubbard was clouded in intellect, they deny that she was not of a sound and disposing mind and memory, they deny that she did not remember the plaintiffs, but that at the time of the execution of said will was in the full possession of her mental faculties, and knew and appreciated the business at hand, the nature and extent of her estate and objects of her bounty.

Defendants deny that plaintiff Rachael E. Kirtley was forgotten by the said Mary Jane Hubbard, and deny that she was suggested by John H. L. C. English, or any other person. They deny that said John H. L. C. English, suggested every other item of said will, or any item of same. They deny that the mind of said Mary Jane Hubbard at the time of signing said will, was weak and imbecile to the extent that she did not comprehend the contents of it, but on the contrary they aver that she did comprehend the contents of it, and the same was written at her dictation and prepared under her directions.

Defendants deny that she was induced to sign said will by the undue influence of the defendant English, but on the contrary they say that said English in no manner attempted to influence her actions, and in no manner attempted to dictate any item, term or condition of said will, and defendants deny that said English had

any purpose or motive so to do. On the contrary, they aver that the said English married the sister of Moses Hubbard and that he has a child by said sister who was a niece of Moses Hubbard and a niece of said Mary Jane Hubbard by marriage and that the said Moses Hubbard devised no part of his estate to the daughter of said English or the wife of said English, and that Mary Jane Hubbard by her will, without suggestion from anyone did leave a legacy of \$500.00 to the daughter of said English, who was a niece by marriage of the said Mary Jane Hubbard, and notwithstanding the near relation to the said Moses Hubbard and Mary Jane Hubbard, this is the only property of the estates of either of them that was left to any relative of the said English.

They deny that said will should be annulled, set aside and held for naught, or any part of the same. They deny that in the event that the court should hold that the plaintiffs are entitled to recover herein, that the same should be divided as set forth in complainants' bill, to-wit: One-fourth to Rachael E. Kirtley, $\frac{1}{4}$ to Albert E. Sutton, $\frac{1}{4}$ to DeLana M. Sutton, $\frac{1}{16}$ to George D. Sutton, $\frac{1}{16}$ to Elizabeth E. Davis, $\frac{1}{16}$ to Ida Krickbaum and $\frac{1}{16}$ to Helen M. Marshall, but on the contrary they aver that Cora D. Spencer is a sister of George D. Sutton, Elizabeth E. Davis and Ida Krickbaum, and in the event of a partition that the said George D. Sutton, Elizabeth E. Davis and Ida Krickbaum each be entitled to a $\frac{1}{20}$ of said property so partitioned.

Defendants deny that complainants are entitled to any part of said estate, or entitled to any partition herein. Defendants deny further that for many years prior to the decease of Mary Jane Hubbard that she was not stable in her actions or determinations, and full mistress of herself or her acts nor her property. Defendants deny that she was unduly influenced, or in any way influenced by the defendant English, deny that she was absolutely subject to the control of defendant English, or any way subject to his control.

Defendants deny that said English managed and controlled and dictated to her concerning her property, without respect to her will or interest or in any other manner. They deny that defendant English compelled her to submit to his control. Defendants deny that he substituted his will for her's in any actions for a long period of years or in any actions at any time.

Defendants deny that he exercised any malignant control or any other control during his lifetime, over the said Moses Hubbard. They deny that said influence was actuated by his fostering, encouraging and catering to a mania of the said Moses Hubbard in his lifetime, and his adjuration relative thereto after the death of Moses Hubbard were imposed and coerced upon the mind of said Mary Jane Hubbard; they deny that he overpowered her will and wishes as to said community property or any other property, but on the contrary defendants aver that both Moses Hubbard and Mary Jane Hubbard were of exceptional mental attainments, that

Moses Hubbard was a practicing physician engaged in active practice of his profession for many years after the execution of said will, was honored and respected in the neighborhood for his ability as a physician and for his sound business methods and his good judgment. That he acquired and accumulated the greater part of his estate in the immediate neighborhood where he lived and where he established the Alla School, that some years prior to his death he built a commodious school building at his own expense, one sufficient to satisfy all the needs and requirements of the school at that time, that he purchased and constructed two additional buildings situated on said land to be used as homes for said teachers; that he supplemented the teachers' salaries in order to procure efficient teachers and paid them their salaries out of his own means to extend and prolong the school to a term of eight months in each year. That he was a person of strong mind and good judgment, and he and his wife desired that the fortune they had accumulated in that neighborhood should go back to the benefit of the neighborhood which induced them to provide an indorsement of said school and provide for its needs and support largely.

Defendants deny that Moses Hubbard was subject to a mania or unsound idea relative to the memory of his deceased daughter, Alla Hubbard Spencer. They deny that he was controlled by any mania in his investments and transactions. Defendants deny that he spent a considerable amount of money, or any amount of

money to procure the manufacture of a brand of flour called the Alla brand, they deny that there ever was such a brand of flour known as the Alla brand, but if mistaken in this, they say that the said Dr. Moses Hubbard was not instrumental in procuring a brand of flour by that name, nor was it named after his daughter.

Defendants aver that it is true that the said Moses Hubbard and Mary Jane Hubbard by their joint will, did dispose of their entire property subject to an interest to the survivor of one-half the revenues derived therefrom, for the indorsement, maintenance and support of the Alla School as set forth in the will, a copy of which is filed with complainants' bill, by the terms of which they did establish a charitable trust.

They deny that the same is a perpetuity in contravention of the laws of the State of Texas, but aver that it was specifically mentioned in said will, that in the event it should be decided that said trustees could not hold said lands without contravening the laws and constitution, then the same be sold and the proceeds be applied to said charitable trust.

Defendants deny that said trust is void because it is indefinite as to the parties beneficiary. They deny that said trust is void because the maker of said will had established no institution and none came into existence except at defendants' directions. On the contrary they aver that said institution had been established, a house erected and for a long time prior to the making and execution of said will said Moses Hubbard and Mary

Jane Hubbard out of their common funds had maintained the same as hereinafter alleged.

Defendants deny that said trust is void because it is beyond the power of the defendants named as trustees to admit or compel or procure the attendance therein of non-resident scholars beyond the scholastic age, but on the contrary they aver that said trust was for the benefit of all Caucasian children between the ages of 6 and 21 years in the event more applied than the funds would accommodate, directing the trustees to give preference to those who had attended the school, those who lived in the district or adjoining district. They deny that said trust is void for the reason that Moses Hubbard and Mary Jane Hubbard were constituted therein as intermediate beneficiaries ahead of said trust, but on the contrary they aver that said trustees were directed to take charge of said property upon the death of either of them, rent the same, collect the rents, revenues, interest, etc., and apply one-half the proceeds to the maintenance and support of said school, rendering the other one-half to the survivor. That in truth and in fact, on, to-wit, the year 1906, after the probate of the will of said Moses Hubbard, said trustees did take possession of all of said property, holding the same adverse to the whole world, and proceeded to carry out the trust as established and directed by the will of said Moses Hubbard.

Defendants further deny that said trust is void because the said Moses Hubbard was not of sound and disposing mind and memory, but they aver on the con-

trary that the said Moses Hubbard was of sound and disposing mind and memory, a man of excellent judgment, wide experience, thoroughly educated and an able and active practicing physician at the time of the execution of the said will, and for many years thereafter.

Defendants deny that said trust was void for the further reason that the said purported will did not contain language whereby any gift or devise or conveyance was made and because the property therein referred to was all community property.

Defendants deny that said survivor was to become and did become the sole owner and free from the testamentary disposition of said property. They deny that no testamentary disposition was made by the said Moses Hubbard, they deny that there was then and there created a naked trust whereof the said Mary Jane Hubbard was sole beneficiary, they deny that the trustees therein had no interest; they deny that said trust was executed and determined for the sole benefit of said Mary Jane Hubbard.

Defendants deny that the defendant trustees never sought a settlement with the executor over the will and never received nor receipted thereunder with the executors for any of the property, and that they never until the proceedings hereinafter related, made claim to any person related nor at any time as trustee; they deny that they attempted to make private use of said property, both real and personal, or either of them, without authority either in law or in equity. They deny that they con-

verted the property and the proceeds thereof unto the private use and benefit of said English.

Defendants deny that to that end they converted and conveyed a portion of said property and real estate whereof he took title unto himself, through the said conversion *ex maleficio* of 515.18 acres located in Denton County, State of Texas, and described in complainants' bill, but they aver the facts to be that the deceased owned about 71 shares of stock in the D. C. Telephone line of the face value of \$10.00 per share. That the defendant, J. H. L. C. English, owned 656 shares of said stock. That divers and different persons had small holdings of stock in the said D. C. Telephone Line. That the said D. C. Telephone Line was not a paying institution and it was the interest of the estate as much as to the other holders of stock in said D. C. Telephone Line to dispose of same. They got an opportunity to trade the entire capital stock of said Telephone Line for 515.18 acres of land. That as there were numerous persons interested in the stock in small amounts, the said John H. L. C. English owning more than a majority of all of the stock, it was agreed that the title should be taken in his name to facilitate a transfer of the same whenever it could be sold, and the said J. H. L. C. English took the said title in his own name at the instance of the different parties as they appeared, including the trust estate held by said trustees.

That he attached to said deed a statement of the interest held by each, respectively, so that upon a sale of

the land, each stockholder including the trust estate held by the Trustees could receive their proportionate shares of the proceeds thereof. That said act was done in good faith and simply for the convenience of a transfer when they might find a purchaser for said land, the same was understood and agreed by the stock holders of said D. C. Telephone Company.

Defendants deny that the suit instituted in the District Court of Collin County, Texas, was an attempt to increase the possession and control of said English, but on the contrary they aver that Mary Jane Hubbard by a deed duly executed, attempted to convey to the Texas Christian University, a corporation located at Fort Worth, Texas, some interest in the trust property held by said Trustees for the benefit of Alla School. That thereupon in order to remove cloud from title and to establish the right of said Trustees in and to all of said property, the said Trustees caused to be instituted in the District Court of Collin County, Texas, a court of general jurisdiction, the same having the jurisdiction of the subject matter and of the persons thereto, a suit against Texas Christian University and against Mary Jane Hubbard to cancel said deed of conveyance to said Texas Christian University to remove cloud from title of said trust estate, and to have said lands and property declared to be the property of the Alla School and of the Trustees controlling the same for said Alla School, divesting all titles out of the Texas Christian University and Mary Jane Hubbard in and to the lands involved in this litigation.

That citation was issued in said cause and the said Mary Jane Hubbard answered therein as defendant denying any interest in and to said property save and except her interest in one-half the proceeds thereof during her lifetime and judgment that was had against her on said answer and disclaimer, and a judgment was had against said Texas Christian University divesting all rights, title and interest of the T. C. U. and Mary Jane Hubbard in and to said lands, and vesting the said title in and to the said Trustee of said Alla School in and for the benefit of said school.

That the said cause was tried before the Honorable F. E. Wilcox, special judge, and agreed upon by the parties to try said cause, F. E. Wilcox, a practicing attorney for more than 20 years' standing in the McKinney Bar, the presiding judge at that time of said court being disqualified to try the same, that the said F. E. Wilcox qualified as special judge, took the oath of office and tried said cause and rendered the judgment therein, which is of record, an exemplified copy of proceedings and judgment as well as an exemplified copy of the will and probate thereof of Moses Hubbard and an exemplified copy of the will and probate thereof of Mary Jane Hubbard will be filed as soon as the clerk can prepare a transcript of the same, and we ask that the same be considered a part of this bill as though the same were copied in it.

Defendants allege that not sufficient time is allowed up to the day they are required to answer herein for

the clerk of the court to prepare said copies, and they ask the indulgence of the court permitting said copies to be filed as soon as it is possible for them to be prepared and certified to. That the records of said case and the probate of said will is in the County Court of Collin County, Texas, and the record of said cause tried in the District Court is of record in said cause between trustees and Texas Christian University and Mary Jane Hubbard in the records of the District Court of Collin County, Texas.

Defendants deny that said Mary Jane Hubbard had no notice of said actions and proceedings, they deny that she was in any manner deceived into signing a purported waiver and disclaimer therein, and deny that the same was without the knowledge and understanding of the said Mary Jane Hubbard; deny that any chicane or deceit was practiced on Mary Jane Hubbard or anyone else; they deny that the same was wholly without consideration or was void or was a misuse of the forms of law; they deny that said judgment was never given or signed by any judge or person possessing judicial power within the State of Texas. On the contrary they aver that said Judge F. E. Wilcox was an active practitioner of law in McKinney, Texas, and had been for more than 20 years, that he was duly selected and qualified to try said cause, because of the disqualification of the judge presiding, that he accepted said appointment, took the oath of office, tried and adjudicated the case with all the due forms of law, and said judgment is in all respects valid

and binding and forever divested out of the said Mary Jane Hubbard any interest that she may have had in and to said lands, except the right to receive one-half the rents and revenues during her lifetime. They deny that said District Court had not jurisdiction in the first instance.

Defendants deny that any petition was pending in the County Court for the construction of said will, and they aver that if any such petition had ever been filed that the same was dismissed and abandoned, the same having never been called for trial and no order ever having been made in the same for more than four years after the filing of same, if any was filed. They deny that said court had jurisdiction in the first instance to construe a will, and if it ever had jurisdiction to construe the same, and if any motion ever had been filed therein, the same had been dismissed and abandoned, by not having been called, continued or tried within four years after the filing of same.

Defendants deny that the judge who assumed to act and did act was without power or authority from any cause to try the same, but they aver on the contrary that he was duly and legally selected and agreed upon by the parties; the heirs, legal representatives and assigns are now estopped from in any way impeaching said judgment.

Defendants deny that any of said real estate was originally usurped by the said J. H. L. C. English, but they aver the fact to be that all of said real estate was

taken possession of by said Board of Trustees, defendants herein, immediately after the probating of the will of Moses Hubbard in 1906, it was taken possession of by virtue and under the authority of said will, and said Trustees have owned, held, controlled and had the actual possession of same, holding the same under title and paying taxes on the same and holding the same adverse to the whole world for more than three years next before the filing of this suit; they further aver that by reason of which plaintiffs claim is barred by the statute of limitation.

Defendants further aver that the said John H. L. C. English and the other Trustees named herein, immediately after the probate of the will of said Moses Hubbard took possession of all of said premises under and by virtue of said will, a recorded instrument in Collin County, Texas, and have held the same in their actual possession, paid all taxes on same for more than five years prior to the institution of this suit, and have held the peaceable and adverse possession thereto for more than five years prior to the filing of this suit, and plaintiffs claim, if any they ever had, is barred by the statute of five years' limitation, and further herein plaintiffs aver that the said John H. L. C. English and the other Trustees named herein, took actual possession of all of said lands and personal property described in complainants' bill on, to-wit, the day of A. D. 1906, under and by virtue of the will of the said Moses Hubbard which had theretofore been duly pro-

bated and duly recorded in the probate records of Collin County, Texas, and held the peaceable and adverse possession of same from said date up to the filing of this suit, which is more than eight years, and plaintiffs herein were apprised of said holding and apprised of said possession, they have acquiesced therein, said trustees having paid all of the taxes thereon and exercised ownership to the exclusion of the entire world, wherefore they say complainants' claim is invalid and demands therefrom a stale demand, and by reason of said limitation and stale demand they are precluded from recovering herein.

Defendants deny that said John H. L. C. English has converted to his own use and benefit the rents of said land, deny that the use and occupation of said land has been of the fair and annual profits of the value of six thousand dollars, and that the plaintiffs are entitled to charge said sum annually to the said English together with the earnings and interest thereon from the date when he assumed possession.

Defendants further deny that plaintiffs are without remedy at law, but on the contrary aver that the Probate Court of Collin County, Texas, a court having exclusive jurisdiction in probate matters, is open to them." (Signed by counsel.)

To which motions and answers were attached the following exhibits:

1. Judgment probating the will of Mary Jane Hubbard.

"Thursday 14th, May 1914.

"At a regular term of County Court of Collin County, McKinney, on Monday the 12th day of April, 1914.

Present and Presiding Hon. H. L. Davis, Co. Judge.
Pearl Strother, County Clerk.
A. Robertson, Sheriff.

The following proceedings in Probate were had:

In the Matter of Estate of Mary Jane Hubbard, Dec'd.
No. 2476.

On this 14th day of May, A. D. 1914, came on to be heard the application for the probate of the last will and testament of the deceased, and for letters thereon, filed herein, on the 11th day of March, A. D. 1914.

And it appearing to the court that legal notices of the filing of said application have been issued and posted in the manner and for the length of time required by law and no one came to contest the same; and it further appearing from the testimony of the subscribing witnesses to said will, sworn to and subscribed in open court, and filed herein, that said Mary Jane Hubbard, deceased, died in the County of Collin, in the State of Texas, where her residence and principal estate was situated, on the seventh day of February, A. D., 1914, that said deceased, at the time of executing said will, was over 21 years of age, and of sound mind; that said will was executed with the formalities and solemnities, and under the circumstances required by law to make it a valid will; that said will has not been revoked by said testator.

It is therefore ordered and decreed by the court that said will is hereby proven and established as the last will and testament of said Mary Jane Hubbard, deceased, and that R. L. Clayton, named in said will, be and is appointed executor of said will and estate, and bond set at \$20,000.00, and that J. H. L. C. English, Mr. Button and J. F. Buchanan are appointed appraisers of said estate."

(To which is attached the will of Mary Jane Hubbard, a copy of which appears as exhibit 1 to the bill of plaintiffs.)

2. Petition to probate the will of Moses and Mary Jane Hubbard (which appears as exhibit 4 to plaintiffs' bill). The judgment probating the same is as follows:
"Estate of Moses Hubbard, Deceased,

July 31st, 1906.

Now on this day came on to be heard the application of J. H. L. C. English to probate the last will and testament of Moses Hubbard, and came the applicant in person, and by attorney, and it appearing to the court that the application to probate said will had been filed more than 20 days before the first day of this term of said court, and that notice of the filing of said application had been given in the manner for the length of time required by law, and no protest or objection having been filed, and it further appearing to the court that the testator was over the age of twenty-one years, and that he was of sound mind and memory, and that said will had been executed under the forms and with the

solemnities required by law, and the court being fully satisfied in the premises, it is ordered, adjudged and decreed by the court that the papers herein filed in this court, bearing the day of be established according to its terms and provisions as the last will and testament of Moses Hubbard.

It is further ordered that J. H. L. C. English, B. F. Spencer and W. L. Yarbrough be, and they are hereby appointed executors of the last will and testament of Moses Hubbard, dec'd.

It is further ordered that they be required to give no bond in said administration.

It is further ordered that A. Callahon, J. W. Kerr and S. J. Lewis be appointed appraisers of said estate and that the clerk of this court record same."

3. The oath and selection of special judge, disclaimers and judgment in cause No. 7072, styled J. H. L. C. English *et al.* vs. Texas Christian University *et al.*:

"OATH OF OFFICE.

I, F. E. Wilcox, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me, as special district judge, to try cause No. 7072, in the District Court of Collin County, Texas, J. H. L. C. English *et al.* vs. Texas Christian University *et al.*, according to the best of my skill and ability, agreeable to the Constitution and laws of the United States, and of this state; and I do solemnly (swear) that, since the adoption of the Constitution of the State, I, being a citizen of this State, have not fought a duel with deadly

weapon, nor have I acted as second in carrying a challenge, or aided, advised or assisted any person thus offending; and I further swear that I have not, directly nor indirectly paid, offered or promised to pay, contribute or promised to contribute, any money or valuable thing, or promised any public office or employment for the giving or withholding a vote at the election at which I was elected.

SO HELP ME GOD.

F. E. Wilcox.

Subscribed and sworn to before me, this the 22d day of February, 1913.

(L. S.)

A. S. Wheatley,

Clerk District Court, Collin County, Texas.

By F. K. Sneed, Deputy.

*Saturday, February 22d, 1913. J. H. L. C. English et al.
vs. Texas Christian University et al. No. 7072.*

Now on this day came on to be heard the above entitled cause, and whereas Honorable J. M. Pearson, the duly elected and qualified District Judge for the 59th Judicial District, is sick and unable to hold court, and whereas, G. R. Smith, attorney, of this bar, has been duly and legally chosen as such judge to hold this term of the District Court in Collin County, Texas; and whereas, said G. R. Smith is disqualified from trying the above entitled cause, he being of counsel for plaintiff, and whereas, by reason of the premises there can be no exchange of judges, and whereas, there appears filed among the papers in this cause instruments in writing duly signed by

all of the parties hereto, plaintiffs and defendants, in which it is agreed that the Honorable F. E. Wilcox, an attorney of this bar, be selected and is hereby selected for the trial of said cause. And he having duly taken the oath of office thereupon the parties hereto announce ready for trial.

And it appearing to the court that said agreement is in words and figures as follows, to-wit:

In the District Court of Collin County, Texas, February Term, 1913. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

It is hereby agreed by the Texas Christian University, one of the defendants in the above entitled cause, that Honorable F. E. Wilcox may and shall act as special judge in this cause, and that this defendant will be fully bound by all his acts in the premises as judge of the court aforesaid, in the said cause.

(Signed) FLOURNOY, SMITH & STORER,
Attorneys for Defendant, Texas Christian University.

No. 7072. In District Court Collin Co. J. H. L. C. English et al. vs. Texas Christian University.

Agreement by Deft. Texas Christian University for Special Judge.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin County, Texas. By F. K. Sneed, Deputy.
No. 2.

J. H. L. C. English et al., Trustees, vs. Texas Christian University et al. No. 7072.

I, Mary Jane Hubbard, one of the defendants in the

above styled and numbered cause, come now and agree and select F. E. Wilcox to act and sit as special judge in the trial of said cause.

(Signed) M. J. Hubbard.

Witnesses:

Robert L. Clayton.

M. Button.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin County, Texas. By F. K. Sneed, Deputy.

Suit pending in the District Court of Collin County, Texas. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

Now comes the plaintiff herein, J. H. L. C. English *et al.*, in the above styled and numbered cause and agree and hereby select Judge F. E. Wilcox as special judge in the above cause.

G. R. SMITH,

W. R. ABERNATHY,

Attorneys for Plaintiffs, J. H. L. C. English et al.

Filed Feb. 22, 1913, J. H. L. C. English, Trustees, vs. Texas Christian University *et al.*

And whereas, the Honorable F. E. Wilcox has accepted said position as judge to try this cause and has duly taken the oath of office on file with the papers of this cause, and a jury being waived and the matters of fact as well as of law being submitted to the court, and the court after hearing the pleadings, and it appearing to the court that the plaintiffs' cause of action is for trespass to try title and to remove cloud from title; and it appearing to the court that the defendant, Texas Christian

University, has filed a disclaimer herein disclaiming all right, title and interest to any of the lands sued for in words and figures as follows, to-wit:

In the District Court of Collin County, Texas, February Term, 1913. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

Now comes Texas Christian University, one of the defendants in the above cause, by attorney and says:

That it disclaims all and any interest, title or estate of whatsoever character in the lands described in plaintiffs' petition herein, and in any property made the subject matter of this suit, and prays to be dismissed, hence with its costs, on this disclaimer.

(Signed) FLOURNOY, SMITH & STORER,
Attorneys for Defendant, Texas Christian University.

No. 7072. In District Court Collin Co. J. H. L. C. English et al. vs. Texas Christian University et al.

Disclaimer by Defendant, Texas Christian University.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin Co., Texas. By F. K. Sneed, Deputy.

And it further appearing to the court that Texas Christian University has been duly and legally cited to appear and answer herein and in time to require an answer to this term of the court, and that no answer has been filed herein, except said disclaimer.

And it further appearing to the court that Mary Jane Hubbard, the other defendant herein, has also filed a disclaimer herein, disclaiming in favor of plaintiff any

and all right, title and interest in and to the land sued for subject to her rights to receive one-half of the rents and revenues of said property during her life time and subject to her right to direct the disbursement of the other half, during her life time, as provided for in the will of Moses Hubbard, deceased, a copy of which is attached to plaintiff's original petition. The disclaimer of Mary Jane Hubbard is as follows, to-wit:

Suit pending in the District Court of Collin County, Texas. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

I, Mary Jane Hubbard, one of the defendants in the above styled and numbered cause, come now and disclaim in favor of plaintiffs any and all right, title or interest in and to any of the lands set out and described in plaintiffs' petition, except as herein specified; and agree that judgment may be rendered in favor of plaintiffs as prayed for in their petition, subject to my rights in the rents, revenues and profits arising from said lands.

M. J. Hubbard.

Witnesses:

Robert L. Clayton.

M. Button.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin County, Texas. By F. K. Sneed, Deputy."

And all parties having announced ready for trial, it is therefore considered by the court that plaintiffs herein, to-wit, J. H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, Superintendent of Public Instruction of Collin County, Trustees of Alla School, in their

fiduciary capacity should have and recover the title and possession of the lands described in plaintiffs' original petition as follows, to-wit :

(Here follows a description by field notes of the land devised in the will of Moses and Mary Jane Hubbard.)

It is further considered by the court that any cloud cast upon plaintiffs' title by reason of the claim of defendants or either of them should be removed subject, however, to the right of Mary Jane Hubbard to receive a life interest in the rents and revenues as hereinabove stated.

It is therefore ordered, adjudged and decreed that plaintiffs, J. H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, Superintendent of Public Instruction of Collin County, as trustees of Alla School Fund in their fiduciary capacity as such, do have and recover of and from the Texas Christian University, the title and possession of the land hereinabove described, and that any cloud cast upon said title by reason of any adverse claim of the said Texas Christian University be and the same is hereby removed.

It is further ordered, adjudged and decreed by the court that the plaintiffs herein named, and in the capacity herein stated, do have and recover of and from the defendant, Mary Jane Hubbard, the title and possession of the lands hereinabove described ; and it is further ordered adjudged and decreed that the cloud cast upon the title of said lands by reason of any adverse claim of the said

Mary Jane Hubbard, be and the same are removed except insofar as she is entitled to receive one-half of the rents and revenues during her natural life derived from said property, and except insofar as she has the right to direct the disbursements of the other half of said revenues, during her natural life as provided in the will of Moses Hubbard, deceased, duly probated in the County Court of Collin County, Texas.

It is further ordered, adjudged and decreed that plaintiffs above named do have and recover of and from the defendants above named judgment of their disclaimer as herein filed.

It is further ordered, adjudged and decreed that the plaintiffs herein above named and in their fiduciary capacity, be taxed with all cost incurred herein by reason of the disclaimer of said defendants, for all of which let execution issue."

Answer of Defendants, Cora D. Spencer and Robert L. Clayton.

"Now come the defendants, Cora D. Spencer and Robert L. Clayton, and for answer herein represent and show to the court :

I.

Said defendants adopt the motions, denials and answers this day filed in this court by defendants, John H. L. C. English, et al, as their motions, denials and answers herein.

II.

Said defendants say that on the day of, 1914, when the will of Mary Jane Hubbard was offered for probate in the County Court of Collin County, that these plaintiffs and their representatives filed in said court a contest of the validity of said will; that thereafter and before said will was admitted to probate, said plaintiffs and their representatives in open court admitted the testamentary capacity of Mary Jane Hubbard, and the validity of her will, and that such admission so made in open court became, was and is a part of the judgment in probating said will, and that these plaintiffs are estopped now to say that said will or any of its provisions is invalid.

III.

Said defendants say that they do not question the validity of the wills of Moses Hubbard or Mary Jane Hubbard, and that they have no desire that the property of said Moses Hubbard and Mary Jane Hubbard shall go in any other way than as directed in their respective wills. But said defendant, Cora D. Spencer says that if upon the hearing of this case the court shall be of the opinion that said wills are invalid, and that the estates of Moses Hubbard and Mary Jane Hubbard descend to their heirs, and are subject to partition, then she asks the court that one-twentieth (1/20) of said estate be set apart to her as a grandchild and heir of Mary Jane Hubbard, deceased, and for such other and further relief as she is entitled to in the premises."

(Said answer was duly signed by counsel.)

Before the disposition of the case, plaintiffs propounded interrogatories to defendants and others, under Equity Rule 58, which were duly answered in reference to the receipts and disbursements of revenues arising from the trust funds in their hands, but the same are not deemed pertinent to the questions herein presented.

Judgment on Motions to Dismiss.

"In this cause came on for hearing upon the bills of complainants with the exhibits, and the answers of the defendants with the exhibits, and the interrogatories of complainants propounded to the defendant, English and Trustees, and the answers of said English and Foster and Gorsett to these interrogatories, and was argued upon the demurrers of the defendant contained in said answers upon the several grounds assigned therein, Allen G. Fisher, *Esq.*, appearing for the complainants, and Cecil H. Smith, *Esq.*, and Wm. R. Abernathy, *Esq.*, appearing for the defendants, English, Finley, Robinson, Foster and District No. 67, and arguing in behalf of said defendants the several demurrers, and the court having heard the argument of counsel, doth take the same under advisement to consider of the said demurrers and the authorities presented, and now, on this June 1st, A. D., 1916, the court being fully advised in the premises, announces his judgment upon the matters submitted as follows:

Upon the demurrer that there is a misjoinder of causes of action, the court doth sustain said demurrer of

the defendants to the bill herein, to which ruling and judgment each complainant asks, and is allowed an exception.

Upon the demurrer of the said defendants to the bill upon the ground that there is a misjoinder of parties defendant, the said demurrer is sustained in its entirety, to which ruling each complainant asks, and is allowed an exception.

Upon the demurrer to the bill upon the ground that therein is not shown a diversity of citizenship, the demurrer is sustained, to which ruling each complainant asks and is allowed an exception.

And upon the general demurrer upon the ground that this court is without power and jurisdiction to hear and determine the causes of action pleaded in said bill and its exhibits, but that under the constitution and laws of the State of Texas, the exclusive original jurisdiction of the matters pleaded in the bills of complainants is entrusted to the County Court of Collin County, Texas, in probate, and to none other, and that by reason thereof this Federal Court has not jurisdiction to entertain said action and determine the controversies pleaded herein, the demurrer is sustained, to which ruling each complainant asks and is allowed an exception.

And thereupon each complainant, by his counsel, announces that he does not desire to plead further, but elects to stand upon his bill and exhibits and the record herein now made in that behalf.

It is thereupon considered ordered, adjudged and decreed by the court now here that the bill and action of the complainants is dismissed, and that the defendants and each of them go hence without day and recover herein their costs."

After the judgment of dismissal was entered the court, at the request of plaintiffs, made the following:

Certificate of Court of Reasons for Dismissal.

"In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no federal question was involved, and that the bill and its exhibits, in my opinion, disclosed the infraction of no right arising under or out of the federal laws or Constitution; but that under the Constitution and laws of the State of Texas, the sole court of original jurisdiction of the matters therein sought to be pleaded is the County Court of Collin County, Texas. By reason whereof, this court might not have jurisdiction or power to entertain the bills of complainants: And that treating the demurrer as presenting this question of jurisdiction, and acting also independently of the demurrer, and on the court's own motion, the suit is dismissed only for the reasons above stated; that is, that the controversy, not arising under the laws and constitution of the United States, there is consequently no jurisdiction of the District Court of the United States.

And also on the ground that the record does not show that the controversy involved is one, in my opinion,

between citizens of different states, but that it appears from the record that some of the defendants who should be considered as plaintiffs and the remainder of the defendants are in fact citizens of the same state, and no other ground of jurisdiction appears from the record. The case is dismissed only for the reasons above stated, that is, that the controversy is not between citizens of different states, and consequently the Circuit Court of the United States has no jurisdiction: And for the reason assigned in the previous paragraph.

This certificate is made conformably to Act of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate, this the 1st day of June, A. D., 1916."

Thereafter, plaintiffs on November 6, 1916, filed the following:

ASSIGNMENT OF ERRORS.

"Each complainant in this action, in connection with his petition for appeal, makes the following assignments of errors, which he avers exists:

I.

The court erred in sustaining the demurrer of the defendants to the complainants' bill and exhibits on the ground of want of jurisdiction over the cause of action pleaded therein.

II.

The court erred in sustaining the demurrer of the defendants on the ground that there was lacking a diversity of citizenship.

III.

The court erred in sustaining the demurrer of defendants on the ground of misjoinder of causes of action.

IV.

The court erred in sustaining the demurrer of defendants on the ground of misjoinder of parties.

V.

The court erred in dismissing complainants' bill.

VI.

The court erred in conceiving that no federal question was involved.

VII.

The court erred in conceiving that it was without jurisdiction or power to entertain the suit.

VIII.

The court erred in dismissing the suit of its own motion.

IX.

The court erred in conceiving that under Article V of the Constitution of the State of Texas, and Section VIII thereof, and Articles 1705 and 1706 of the Statutes of the State of Texas describing the jurisdiction of District Courts, that the suit of the complainants herein was

not within the jurisdiction of this court, and was only within the exclusive jurisdiction of the County Court of Collin County, Texas, in probate; and that this was not a court of general jurisdiction of the State of Texas.

Wherefore, the District Court of the United States within and for Sherman Division, the Eastern District of Texas, wherein is situate Collin County, Texas, was without jurisdiction or power to entertain the suit. Wherefore the complainants pray that said judgment be reversed."

Following the foregoing assignment of errors, plaintiffs presented their petition and bond for an appeal to bring this cause to the Supreme Court of the United States for review, and on November 6, 1916, said appeal was granted by Honorable Gordon Russell, District Judge, before whom the case was tried, and the bond approved, and record was filed in this court.

Statutes Involved.

Provisions of the Texas Constitution and Statutes as to courts and their jurisdiction:

Art. V, Section 1, Texas Constitution:

"The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioner's Courts, in courts of justices of the peace, and in such other courts as may be provided by law."

Art. V, Section 8, Texas Constitution:

"The district court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and *certiorari* and all writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters, over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The district court shall have appellate jurisdiction and general supervisory control over the county commissioner's court with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by

law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law."

Art. V, Section 16, Texas Constitution:

"The County Court shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice's court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed \$200.00, and they shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value \$200.00, and not exceed \$500, exclusive of interest, and concurrent jurisdiction with the district court when the matter in controversy shall exceed \$500.00, and not exceed \$1000, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases civil and criminal of which justices' courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed \$20, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from justices' courts there shall be a trial *de novo* in the county court, and appeals may be prosecuted from the final judgment rendered in such cases by the county court, as well as all cases civil and criminal of which the county court has exclusive or concurrent or original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.

The County Court shall have the general jurisdiction of a probate court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis* and common drunkards, grant letters testamentary and of administration,

settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons *non compos mentis* and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; and the county court, or judge thereof, shall have power to issue writs of injunction, mandamus and all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of the county court, or any other court or tribunal inferior to said court."

Art. 1706, Revised Statutes of Texas:

"The district court shall also have appellate jurisdiction and general control in probate matters over the county court established in each county for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians and minors as is, or may be, provided by law. Such court shall also have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever, for which a remedy or jurisdiction is not provided by law or the constitution, and such other jurisdiction, original and appellate, as may be provided by law."

Art. 3206, Revised Statutes of Texas:

"The county court shall have the general jurisdiction of a probate court. It shall probate wills,

grant letters testamentary or of administration, settle the accounts of executors and administrators, and transact all business appertaining to the estates of deceased persons, including the settlement, partition and distribution of such estates."

Art. 3207, Revised Statutes of Texas:

"The district court shall have appellate jurisdiction and general control in probate matters over the county court establishing in each county for the probating of wills, granting letters testamentary or of administration, settling the accounts of executors and administrators, and for the transaction of business appertaining to estates, and original jurisdiction and general control over executors and administrators under such regulations as may be prescribed by law."

Art. 3358, Revised Statutes of Texas:

"When a will has been probated, its provisions and directions shall be executed, unless the same are annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate."

Art. 3359, Revised Statutes of Texas:

"Such proceeding shall be by application in writing, filed with the clerk of the court, setting forth the provisions and directions in the will that are objected to, and the grounds of objection."

Art. 3360, Revised Statutes of Texas:

"Upon the filing of such application, the clerk shall issue a citation for the executor or administrator with the will annexed to appear at a regular term of such court and answer such application, the substance of which application shall be set forth in the citation; and such citation shall further direct

such executor or administrator to refrain from executing the provisions and directions in the will that are objected to, until such application has been heard and decided by the court."

Art. 3361, Revised Statutes of Texas:

"If it appear upon the hearing of such application that no material injury to the interests of the applicant will be occasioned by executing the provisions and directions of the will, and that such provisions and directions are legal, the objections shall be overruled, and the provisions and directions objected to shall be confirmed and executed, and an order to that effect shall be entered upon the minutes; otherwise an order shall be entered upon the minutes of the court annulling the provisions and directions in the will to which objections are sustained, or suspending the execution of the same until the further order of the court."

Art. 5699, Revised Statutes of Texas:

"Any person interested in any will which shall have been probated under the laws of this state, may institute suit in the proper court to contest the validity thereof, within four years after such will shall have been admitted to probate, and not afterward."

Election and qualification of special judge:

Art. V, Section II, Texas Constitution:

"* * * When a judge of the district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. * * *

Motion to Dismiss or Affirm.

Now come J. H. L. C. English, F. S. Finley, W. E. Foster, J. T. Robinson, District Trustees of District No. 67 in Collin County, Texas, Cora D. Spencer and Robert L. Clayton, appellees, praying judgment of the court on the appeal prosecuted by appellants, Albert E. Sutton, DeLana M. Sutton, Rachael E. Kirtley, Helen M. Marshall, Elizabeth E. Davis, Geo. D. Sutton and Ida Krickbaum, say that this court should not take further cognizance of same, and pray that the same be dismissed for the want of jurisdiction in this:

I.

The complaint, or bill in equity, of appellants seeks to contest and set aside the joint will of Moses and Mary Jane Hubbard, and the will of Mary Jane Hubbard, and the judgments probating same, and presents questions of pure probate over which the County Court of Collin County, Texas, has, under the laws of Texas, exclusive jurisdiction as a probate court, and over which the District Court of the United States for the Eastern District of Texas, in which said complaint or bill in equity was filed, has no jurisdiction.

II.

When the parties named in said complaint or bill of equity are aligned according to their respective interests, diversity of citizenship does not exist, and the District Court of the United States in which the complaint or bill in equity was filed, is without jurisdiction.

In the event this court denies the motion to dismiss the appeal, the appellees pray that the court affirm the judgment of the District Court, because it is manifest that the appeal was taken for delay only, and because the questions raised on this appeal are frivolous and are so far foreclosed by the decisions of this court as not to need further argument.

W. R. ABERNATHY,
GEORGE R. SMITH,
CHAS. BATSELL,
HEAD, DILLARD, SMITH, MAXEY & HEAD,

Attorneys for Appellees.

Wm. F. Smith,
Of Counsel.

**BRIEF OF ARGUMENT ON MOTION TO
DISMISS OR AFFIRM.**

Short Statement.

Succinctly stated, appellants brought this suit to recover real and personal property located in Collin County, Texas, of the alleged value of one hundred and sixty-four thousand dollars (\$164,000), and for partition. It appears from the pleadings and the exhibits thereto that Moses and Mary Jane Hubbard, while living together as husband and wife, in Collin County, Texas, acquired said property, and that the same was the community property of said Moses and Mary Jane Hubbard. On May 26, 1906, Moses Hubbard died, a daughter named Alla had been born to Moses and Mary Jane Hubbard, but she died without issue before her father, so that at his death, Moses Hubbard left no descendants. Prior to his death, and on January 5, 1897, Moses Hubbard and his wife executed a joint will devising their entire estate to the appellees, except R. L. Clayton and Cora D. Spencer, in trust. By the terms of the will, at the death of Moses Hubbard, the Trustees were to take charge of the estate, manage same and apply one-half of the net revenues arising therefrom to maintaining the school in District 67 in Collin County, Texas, known as the Alla School, and pay the other half of the net revenues to the surviving wife so long as she lived, and at her death apply all

the revenues arising from said trust estate to the maintenance of said Alla School. On July 31, 1906, the joint will of Moses Hubbard and wife was probated by a judgment of the County Court of Collin County. At the death of Moses Hubbard said Trustees took charge of the trust estate, managed same, applied half of the revenues to Alla School and paid the other half to Mary Jane Hubbard until her death, on February 17, 1914, and since said time and now possess and manage said estate and claim to pay revenues arising therefrom to the maintenance of said Alla School.

After the probating of the will of Moses and Mary Jane Hubbard, and prior to the death of Mary Jane Hubbard, and on January 11, 1913, appellee Trustees filed in the District Court of Collin County a suit against Texas Christian University and Mary Jane Hubbard, alleging that the defendants in that suit were setting up a claim to the trust estate in their hands, and asking that their title be quieted. On February 22, 1913, a judgment was rendered in said cause for said Trustees as against the Texas Christian University, vesting all the interest of Mary Jane Hubbard in the trust estate in said Trustees, subject alone to the right of Mary Jane Hubbard to receive half the revenues arising therefrom during the rest of her life.

At the death of Mary Jane Hubbard, she left a separate estate acquired after the death of her husband, of the alleged value of eighteen thousand (\$18,000.00) dollars, and a will dated February 5, 1914, disposing of same.

Said will, after making a number of specific bequests to relatives and friends, in clause twelve, devises her jewelry and the remainder of her estate to appellee, Cora D. Spencer, and names appellee, R. L. Clayton as executor of said will.

The said will of Mary Jane Hubbard was probated by the judgment of the County Court of Collin County on May 14, 1914, and the estate was taken charge of by R. L. Clayton, as executor.

Appellants, by their complaint herein, seek to contest and set aside as invalid the joint will of Moses and Mary Jane Hubbard and the judgment of the County Court of Collin County probating the same; to contest and set aside as invalid the judgment of the District Court of Collin County, wherein the interest in the trust estate of Mary Jane Hubbard is vested in appellee Trustees; to contest and set aside as invalid section twelve of the will of Mary Jane Hubbard and the judgment of the County Court of Collin County probating same insofar as said section might be held to devise the trust or community estate to appellee, Cora D. Spencer; then asserting that the trust estate was the community estate of Moses and Mary Jane Hubbard, that at the death of Moses Hubbard without children, Mary Jane Hubbard inherited all, and at the death of Mary Jane Hubbard without children, the appellants and appellee, Cora D. Spencer, as next kin to Mary Jane Hubbard, inherited the trust estate, and asking partition of same. Motion to dismiss the complaint for want of jurisdiction was sustained, and a direct appeal prosecuted to this court.

I.

The complaint assails the validity of a will and its probate, and presents matters of pure probate; in the absence of a law in Texas where the will was probated, giving the right in a suit **INTER PARTES** to assail the probate of wills, the Federal District Court is without jurisdiction of same.

At the foundation, in order for appellants to recover in this cause, it is necessary to set aside the joint will of Moses and Mary Jane Hubbard and the judgment of the County Court of Collin County probating the same. True, the judgment of the District Court of Collin County, vesting the interest of Mary Jane Hubbard in appellee Trustees, and the residuary clause in the will of Mary Jane Hubbard vesting her undevise estate in Cora D. Spencer, and the judgment probating that will, are obstacles that lie between appellants and the coveted goal, still the annulling of the before mentioned joint will is a matter of first importance which is sought to be accomplished by the complaint.

In *O'Callaghan v. O'Brien*, 199 U. S. 110, this court, after reviewing at some length the authorities on the proposition here presented, announced the following propositions:

1. That, as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

2. That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes*, the right to question at law the probate of a will, or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states, or aliens, will enforce such remedies.

To the same effect, *Waterman v. Canal—Louisiana Bank & T. Co.*, 215 U. S. 44; *Broderick's Will*, 21 Wall. 503; *Steed v. Curtis*, 191 Fed. 534.

The laws of Texas do not confer the right to bring suit INTER PARTES to nullify the probate of a will, but such proceeding is made an ancillary probate proceeding.

Art. V, Section 16, of the Constitution of Texas, provides that the County Courts shall have the general jurisdiction of probate courts; they shall probate wills. Art. 3206, Revised Statutes of Texas carries out this mandate of the Constitution, and makes a similar provision. Art. V, Section 8, of the Constitution of Texas provides that the District Courts shall have appellate jurisdiction and general control in probate matters over the County Court established in each county for appointing guardians, granting letters testamentary and of administration, and of probating wills. Arts. 1708 and 3207, Revised Statutes of Texas, carry out this mandate of the Constitution.

The provisions of the Texas statutes directly applicable are the following:

Art. 3358: "When a will has been probated, its provisions and directions shall be executed, unless the same are annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate."

Art. 3359: "Such proceeding shall be by application in writing, filed with the clerk of the court, setting forth the provisions and directions in the will that are objected to, and the grounds of objection."

Art. 3360: "Upon the filing of such application, the clerk shall issue a citation for the executor or administrator with the will annexed to appear at a regular term of such court and answer such application, the substance of which application shall be set forth in the citation; and such citation shall further direct such executor or administrator to refrain from executing the provisions and directions in the will that are objected to, until such application has been heard and decided by the court."

Art. 3361: "If it appear upon the hearing of such application that no material injury to the interests of the applicant will be occasioned by executing the provisions and directions of the will, and that such provisions and directions are legal, the objections shall be overruled, and the provisions and directions objected to shall be confirmed and executed, and an order to that effect shall be entered upon the minutes; otherwise an order shall be entered upon the minutes of the court annulling the provisions and directions in the will to which objections are sustained, or suspending the execution of the same until the further order of the court."

Construing the foregoing provisions of the Texas Constitution and laws, the courts of Texas have held that a proceeding to set aside a will and the judgment pro-

bating it must be filed in the probate court that rendered the judgment of probate.

Franks v. Chapman, 60 Tex. 46.

Franks v. Chapman, 61 Tex. 579.

Heath v. Layne, 62 Tex. 86.

Fisher v. Wood, 65 Tex. 204.

Dewe v. Dewe, 57 S. W. 926.

Hilgers v. Hilgers, 159 S. W. 853.

It is, perhaps, pertinent here to remark that the foregoing has been the rule in Texas since the adoption of the present Constitution in 1879. Prior to that time a different rule prevailed.

So much of appellants' complaint as seeks to set aside section twelve of the will of Mary Jane Hubbard and the probate of same, insofar as it applies to the trust estate sought to be recovered, is in the same situation as the parts seeking to set aside the joint will herein discussed. For the same reasons there is lack of jurisdiction as to that.

II.

The courts will align the parties to suits according to interest, then if diversity of citizenship does not exist, the cause will be dismissed for want of federal jurisdiction.

The complaint shows that Mary Jane Hubbard died without children or husband; that her heirs and next of kin are two brothers and a sister, Albert E. Sutton, DeLana M. Sutton and Rachael Kirtley, and the heirs of a

deceased brother, Lewis Sutton. Lewis Sutton had five children, Cora D. Spencer, Elizabeth E. Davis, Ida Krickbaum, Geo. D. Sutton, and Lewis Sutton, Jr., Lewis Sutton, Jr., died without children, and left as heirs his brothers and sisters and mother, Helen M. Marshall. That is, the heirs of Mary Jane Hubbard are her sister and two brothers, and the widow and children of a deceased brother, Lewis. All of these parties named are appellants, and were plaintiffs below, and have their domiciles in states other than Texas, except appellee, Cora D. Spencer, who was a defendant below, and who, at the time the suit was instituted, had a domicile in Texas. The appellee Trustees and the appellee Clayton resided in Texas. It is our insistence that the interest of Cora D. Spencer in the recovery and partition of the trust estate is identical with that of appellants, and for that reason, diversity of citizenship does not exist in this cause.

In *Helm v. Zarecor*, 222 U. S. 356, it is said:

"It was undoubtedly the duty of the court, in determining whether there was the requisite diversity of citizenship, to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill."

Such seems to be the clear mandate of Section 37 of the Judicial Code. *Gilbert v. Davis*, 235 U. S. 565.

Cora D. Spencer was a necessary and indispensable party to the cause. *Barney v. Baltimore*, 6 Wall. 280.

After the necessary parties are aligned according to interest, unless there is diversity of citizenship as to

each party on each side of the controversy, then federal jurisdiction does not exist.

Anderson v. Watt, 138 U. S. 694.

Rich v. Bray, 37 Fed. 273.

Barney v. Baltimore, 6 Wal. 280.

Bland v. Freeman, 29 Fed. 669.

Cilley v. Patten, 62 Fed. 498.

While we insist that the setting aside of the joint will of Moses and Mary Jane Hubbard and its probate is a proposition that lies at the base of any right of appellants to recover, and that there is no federal jurisdiction as to that matter, both on the ground that it is a matter of pure probate, and that diversity of citizenship is lacking, and that the lack of jurisdiction as to this proposition is decisive of the controversy; still it may be contended that there are other propositions involved in the complaint that occupy a different attitude.

The complaint does seek to set aside section twelve of the will of Mary Jane Hubbard and its probate insofar as the same affects the trust estate, and it may be contended that inasmuch as Cora D. Spencer is the residuary legatee of Mary Jane Hubbard, that the interests of appellants and Cora D. Spencer are adverse, and that the proposition that there is lack of diversity of citizenship will be denied.

The construction of the residuary clause in Mary Jane Hubbard's will and the determination of the proposition of whether, the joint will being invalid, the trust estate would pass to Cora D. Spencer, depends upon the intention of the testatrix in making the residuary clause.

She and her husband had bequeathed the trust estate to appellee trustees. For nearly eight years after the death of her husband she accepted half the revenues arising from the trust estate, under the will that bequeathed the estate to appellee trustees. On February 22, 1913, she filed a disclaimer as to any interest in the trust estate, except the right to collect half the revenues arising from same for life. On February 5, 1914, she made the will containing the residuary clause, as follows:

"I give and bequeath all the residue of my property that has not been bequeathed, including my jewelry, to my loving niece, Cora D. Spencer, to have and to hold to her in fee simple forever."

We respectfully submit that the residuary clause, the joint will aside, does not pass the trust estate to Cora D. Spencer, but only attempts to dispose of her separate estate acquired after the death of her husband, and that said residuary clause is not a matter actually involved in the recovery of the property by appellants. At all events, this proposition of the complaint is clearly vulnerable to the objection that it presents a matter of pure probate.

That phase of the complaint that seeks to set aside the judgment of the District Court of Collin County, vesting the interest of Mary Jane Hubbard in appellee trustees, rendered after the probate of the joint will, while not affecting a probate matter, is vulnerable to the objection that diversity of citizenship is lacking.

For the foregoing reasons we assert that in the complaint of appellants and every phase of it, federal jurisdiction is lacking, and that this cause ought to be dismissed.

It may be that in view of the fact that the determination of the proposition of whether a Federal District Court had jurisdiction of a suit, always presents a federal question of which this court has jurisdiction, that, for this reason, this court will decline to dismiss this cause. In that event, appellees say it is manifest that this appeal is taken for delay only, and that the questions of jurisdiction are frivolous, and are so far foreclosed by the decisions of this court as not to need further argument, and asks that the judgment of the District Court be affirmed.

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Attorneys for Appellees.

Geo. R. Smith.
Of Counsel.



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No. [REDACTED] 330

IN THE
Supreme Court of the United States

OCTOBER TERM, 1916.

ALBERT E. SUTTON, ET AL., APPELLANTS,

VS.

JOHN H. L. C. ENGLISH, ET AL., APPELLEES.

**BRIEF FOR APPELLEES ON HEARING ON
SUMMARY DOCKET.**

W. R. ABERNATHY,
GEO. R. SMITH,
CHARLES BATSELL,
HEAD, DILLARD, SMITH, MAXEY & HEAD,
Attorneys for Appellees.

CECIL H. SMITH,
Of Counsel.



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No. 795.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

ALBERT E. SUTTON, ET AL., APPELLANTS,
VS.
JOHN H. L. C. ENGLISH, ET AL., APPELLEES.

BRIEF FOR APPELLEES ON HEARING ON SUMMARY DOCKET.

STATEMENT.

Albert E. Sutton, et al., appellants, plaintiffs below, filed this, a bill in equity, in the District Court of the United States for the Eastern District of Texas, at Sherman, August 14, 1915. John H. L. C. English, et al., appellees, defendants below, filed motions to dismiss in the nature of demurrers, and pleas ~~to~~ the jurisdiction of the court, to which were subjoined answers, on September 4, 1915.

The motions assailing the jurisdiction of the court were duly submitted, and on June 1, 1916, were sustained, and the bill dismissed for want of jurisdiction, and an appeal perfected direct to this court.

Appellants presented to this court on January 15, 1917, motion to dismiss or affirm, and this court, on January 22, 1917, made an order placing said cause on the summary docket.

Plaintiffs' Bill in Equity.

Your petitioners respectfully show unto Your Honor that this action is a civil action wherein there is diversity of citizenship between the parties plaintiff and the parties defendant, and the amount in controversy is more than the sum of Five Thousand Dollars exclusive of interest and costs—being in fact the sum and amount of one hundred sixty-four thousand dollars and more, and the amount in controversy upon the part and in the behalf of each complainant is more than the sum of six thousand dollars. Your petitioners who are complainants, respectfully aver and show unto Your Honor, that the plaintiff, Albert E. Sutton, is a citizen, resident and inhabitant of Town of Kay-Cee in the County of Johnson, and State of Wyoming, and the plaintiff, DeLana M. Sutton, is a citizen, resident and inhabitant of the Town of Harrison, in the County of Sioux, and State of Nebraska, and the plaintiff, Rachael E. Kirtley is a citizen, resident and inhabitant of the City of Hot Springs, in Fall River County, and State of South Dakota, and the plaintiff, Helen M. Marshall, is a citizen, resident and inhabitant of the Town of Jerseyville, in the County of Jersey and the State of Illinois, and the plaintiff, Elizabeth E. Davis, is a citizen, resident and inhabitant of the Town of Harrison, County of Sioux, and State of Nebraska, and the plaintiff,

George D. Sutton is a citizen, resident and inhabitant of the Town of Jerseyville, and County of Jersey, and State of Illinois, and the plaintiff, Ida Krickbaum, is a citizen, resident and inhabitant of the City of Ft. Collins, and County of Larimer, and State of Colorado, and such residence, citizenship and inhabitancy prevailed at all the dates hereinafter mentioned, and prior to the seventh day of February, A. D., 1914.

And the plaintiffs allege further that now, and at all the dates hereinafter mentioned and prior to the seventh day of February, A. D., 1914, each Robert L. Clayton, and F. S. Finley and J. T. Robinson, and John H. L. C. English was a citizen, resident and inhabitant of the Town of Celina, in Collin County, and State of Texas, and W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, was a resident, citizen and inhabitant of the City of McKinney and County of Collin, and State of Texas, and Cora D. Spencer was a citizen, resident and inhabitant of Weston, in the said county of Collin and State of Texas, and the defendant District Trustees of District Number 67, in the County of Collin and State of Texas, is a municipal corporation in and for the said district and the County of Collin and State of Texas, and each and every of the said defendants is within the Sherman division of the Eastern District of the State of Texas.

And petitioners allege that this action is for the construction of a will whereunder plaintiffs claim an inheritance in lands within the counties of Collin and Den-

ton in the said division, district and state of Texas; and for an accounting by the said defendants English and Finley and Robertson and the quieting of title in plaintiffs to said real estate and to personal property in the possession of the said defendant English and all within the counties of Collin and Denton, in said division, district and state.

Your petitioners allege that the interest of each plaintiff in the subject of controversy, which is hereinafter described, arises out of the following circumstances: That about 1866, Moses Hubbard and Mary Jane Hubbard, husband and wife, settled on a parcel of the real estate hereinafter described, in Collin County, Texas, and from that time continuously until the dates of their respective deaths, each lived as a citizen, resident and inhabitant of the said county and state, and during their joint life time they lived and cohabited together as husband and wife and as one family until the said Moses Hubbard departed this life on May 26, 1906, leaving him surviving, the said Mary Jane Hubbard, his wife, and no descendant and no other heir. And the said Mary Jane Hubbard of the said county and state, departed this life on February 7, 1914. That at the time of the death of the said Mary Jane Hubbard, she left no children nor husband, but she left surviving: Rachael E. Kirtley, and Albert E. Sutton, and DeLana M. Sutton, her brothers; and she left also surviving her the children of a deceased brother, Lewis Sutton, and the names of the said children who survived the said Mary Jane Hubbard were:

Cora D. Spencer, Elizabeth E. Davis, Ida Krickbaum, George D. Sutton and Lewis Sutton, Jr. And that the said Lewis Sutton, Jr., departed this life intestate at Jersey County, Illinois, on September 2, 1914, unmarried and without descendants; and left as descendants his mother, Helen M. Marshall, and his sisters, the said Cora D. Spencer, Elizabeth E. Davis and Ida Krickbaum, and one brother, Geo. D. Sutton; and these last are the only heirs at law of the said Mary Jane Hubbard and Moses Hubbard.

That the said Moses Hubbard and Mary Jane Hubbard, husband and wife, at the time when they domiciled thus in Collin County, Texas, were entirely without means or property; and by their joint labors and earnings and saving, they had accumulated as community property, belonging to them, the real estate hereinafter described, in the sum of about 983 acres, and also their household and kitchen furniture, and cow and calf, which was exempt together with the homestead of 200 acres; and also personal property owned by the said community, consisting of notes and shares of the capital stock of the Celina Mill and Elevator Company, all in Collin County; and shares of capital stock of the Pilot Point National Bank, Denton County, Texas; and shares of stock in the D. C. Telephone Company, which community was of about the value of \$100,000.00.

That there had been born unto the said Moses Hubbard and Mary Jane Hubbard, one daughter and no other child, and the said daughter had pre-deceased her said

father and mother, and she left no descendants. By reason of the said community property in its general characteristics of the matter of an estate by entireties; and the whole and every portion thereof descended unto the survivor of the said community, the said Mary Jane Hubbard.

Plaintiffs allege further that the said Mary Jane Hubbard had accumulated in addition to the said community property, which was hers, separate property by her own exertions amounting in value to about \$18,000, consisting of a dwelling house and the ground whereon the same stood; and notes and household goods and jewelry; and stock in two banks and money on deposit in a bank.

Plaintiffs state further that at the time of the last sickness of the said Mary Jane Hubbard, and while she was in the very article of death and then almost 71 years of age, in the absence of the plaintiffs from her death-bed side and without their knowledge or procurement, she was persuaded and influenced into the execution of an instrument in the form of a will wherein and whereby she purported to dispose of the accumulations and separate property of herself. A copy of said will is filed herewith and marked exhibit "A" to this bill and is made a part hereto by the said identification; and prayed to be deemed and taken as a part of this bill, as fully as if the same were included and set out at length herein. And plaintiffs say that there was no reference or mention in said purported will of any plaintiff except Ra-

chael E. Kirtley, who consents that the said purported will may be voided and held of none effect, and offers hereby to throw into Hotch-Potch the bequest unto her, which consists of 20 shares of the capital stock of the Celina State Bank. And the plaintiffs say that on February 5, 1914, when the said writing was made, the said Mary Jane Hubbard was clouded in her intellect; and that she was not of sound or disposing mind or memory; and that she did not remember the plaintiffs except the said Rachael E. Kirtley, although she desired and intended so to do. That the name of said plaintiff was not remembered by said Mary Jane Hubbard, but was suggested by John H. L. C. English, as also every other item thereof. And that her mind and memory at the time of signing the purported will was weak and imbecile to the extent that she did not comprehend the contents of it; and that she was induced to sign the same by the undue influence of the defendant English, by purpose and through motives of his own. And that the same ought to be annulled and set aside and held for naught; nevertheless, these plaintiffs do not desire to interfere with the distribution made by the defendant, Clayton, purporting to act as executor of said will, but they bring this bill for the purpose of having it annulled to the extent only that the 12th paragraph, which is in the words and figures following, to-wit:

12. I give and bequeath all the residue of my property that has not been bequeathed, to my loving niece, Cora D. Spencer, to have and to hold forever; be de-

creed and determined for ever more, not to be a testamentary disposition of that portion of her separate estate, which had once been community estate of the said Moses Hubbard and Mary Jane Hubbard; and that the said community property should be held and decreed to pass unto the plaintiffs in the proportions hereinafter described, pursuant to the provisions of Article 3235 of the Civil Statutes of the State of Texas, as estate which is not divided or bequeathed, and by reason whereof should be divided immediately to the plaintiffs in the following proportions:

Unto Rachael E. Kirtley, $\frac{1}{4}$; to Albert E. Sutton, $\frac{1}{4}$; to DeLana M. Sutton, $\frac{1}{4}$; to Elizabeth E. Davis, $\frac{1}{16}$; to Ida Krickbaum, $\frac{1}{16}$; to Helen M. Marshall, $\frac{1}{16}$, to Geo. D. Sutton, $\frac{1}{16}$.

The plaintiffs allege further that for many years prior to her said decease, the said Mary Jane Hubbard was not stable in her actions or determinations; and not fully mistress of herself, nor her acts nor property; but that she was unduly influenced by and was absolutely subject to the control of the defendant English, who managed and controlled and dictated to her concerning her property and proceeds thereof, without regard to her will or her interest; and compelled her to submit to his control, and substituted his will for hers in many actions for a long period of years, and in truth and in fact, he exercised such malignant control during his lifetime over the said Moses Hubbard, which influence was actuated by his fostering and encouraging and catering to a mania

of the said Moses Hubbard in his lifetime, and his adjurations relative thereto after the death of said Moses Hubbard, were imposed and coerced upon the mind of the said Mary Jane Hubbard and overpowering her will and wish in relation to the said community property.

The plaintiffs allege that the said Moses Hubbard was subject to a mania or unsound idea relative to the memory of his deceased daughter, Alla Hubbard Spencer, and was controlled thereby in his investments and transactions; that he spent a considerable amount of money to procure the manufacture of a brand of flour called the Alla Brand, by the Celina Mill and Elevator Company. And that he erected a cheap building for school purposes within the limits of Roseland, District 67, whose trustees are defendants herein, and did other acts in pursuit of the same delusion. And that he attempted a disposal of the community property of his said wife by a purported will which was executed by him after he was 71 years of age in the year 1897, a copy of which will, marked exhibit "B" to this bill is filed herewith, and prayed to be taken as a portion of this bill and paragraph as though set out here in words; and by the terms whereof it was attempted to establish and create in said community property after it should become separate property of Mary Jane Hubbard, a charitable trust, in perpetuity for the claims therein, described in the following language:

"We have founded an institution for increase and diffusion of knowledge, which we have named Alla, and

which shall remain permanently located on the same survey on which it is located, to-wit: Wade H. Rattan, and it is our desire that the trustees herein provided for, shall use the available fund in the employment of teachers, erection of proper and necessary buildings, the purchase of apparatus, and other germane uses; and desire that at this school or institution of learning, all children whose parents are Caucasian and of the white race, and over the age of 6 and under the age of 21, shall be admitted free of tuition; but in case more apply than the funds will justify, then the trustees in determining who shall be admitted, are requested to give preference to worthy students who have been in attendance before, and those residing in the school district or adjacent thereto."

Plaintiffs allege further that the said trust is void because it is indefinite as to parties beneficiary; and because the maker of the said will had established no institution and none was in existence except the defendant district; and because it was beyond the power of the defendants named as trustees, to admit or compel or procure the attendance therein of non-resident scholars who are beyond scholastic age; and for the further reason that Mary Jane Hubbard and Moses Hubbard were constituted therein as intermediate beneficiaries, ahead of said trust and for the further reason that the said Moses Hubbard was not of sound and disposing mind and memory; and for the further principal reason that the said purported will did not contain language whereby any

gift or devise or bequest or conveyance was made and because the property therein referred to was all community property, whereof the survivor was to become and did become sole owner and possess, free from the testamentary disposition if any was made; but in fact none was made by the said Moses Hubbard.

And plaintiffs say that if the said instrument had any effect in law, which these plaintiffs declare was not had thereby, then there was created a naked trust, whereof the said Mary Jane Hubbard was sole beneficiary and the persons named therein defendants, who claim to be trustees, had no interest and by the law of the land the trust was executed and determined, in, and for the sole benefit of, the said Mary Jane Hubbard.

Plaintiffs allege further that the defendants trustee never sought a settlement with the executors over the purported will and never received from nor receipted thereunder unto the said executors for any of the property and they never, until the proceedings hereinafter related, made claim to any person related, nor at any time as trustee, but all of them attempted to make private use of the said property, both real and personal, without authority either in law or in equity; and to convert the property and the proceedings thereof, unto the private use and benefit of the said defendant English, and to that end conveyed and converted a portion of the said personal property into real estate, whereof he took the title unto himself, through the said conversion *ex maleficio* of 515.18 acres located in the County of Denton

and State of Texas aforesaid. (Fully described by metes and bounds.)

Plaintiffs allege further that afterwards, in an attempt to increase his possessions and control, the said English, nominally joining with himself the other defendants herein named and claiming to be trustees, to-wit: John H. L. C. English, J. T. Robinson, F. S. Finley and W. E. Foster, signed in the District Court, Collin County, Texas, a petition, which petition was filed on January 11, 1913, wherein was alleged that the will hereinbefore referred to, marked Exhibit "B" was a joint will, "under a compact, agreement and contract" mutually binding on each, and the same after the death of the said Moses Hubbard; and the purporting of the said will was irrevocable by either the said Moses Hubbard or Mary Jane Hubbard; and also "that under the premises of said will, the said Mary Jane Hubbard received rights and emoluments and privileges, which she would not have had but for the said will; that the said Mary Jane Hubbard accepted under said will and has at all times since the probating thereof accepted and exercised those rights, privileges and emoluments; and by reason of the premises said will is irrevocable by the said Mary Jane Hubbard," and alleging that a trust was created by said will in behalf of the said English, Finley, Robinson and Foster; and prayed for citation thereon and judgment for the title to the premises, therefore that a trust be declared in their favor; but these plaintiffs allege that no citation was issued and the said Mary Jane Hubbard had no

notice of the said actions nor proceedings in the premises and that she was deceived, as plaintiffs are informed, into signing a purported waiver and disclaimer therein, but the same was without the knowledge or understanding of the said Mary Jane Hubbard, and by chicane and deceit; and was wholly without consideration and was void because it was a misuse of the forms of law; and the judgment was never given nor signed by any judge or person possessing judicial power, within the State of Texas.

And especially by reason of the fact that the said petition was in effect both in law and in equity an application for the construction of the said paper as the will of Moses Hubbard, whereof the District Court had not jurisdiction in the first instance, and for which construction of which said instrument there was then and yet pending in the county probate court of Collin County, Texas, a petition signed by the said purported trustees whereupon the judgment of the said County Court will, and would be binding and exclusive upon said purported trustees, without and beyond, and free from the assumption of power in the District Court of said County. And, moreover the person who assumed to act as judge for that cause was without power or authority, for the reasons stated above which also prevailed in relation to said Mary Jane Hubbard in her signature, as to his selection, on her part. And plaintiff says that the real estate originally usurped and taken possession of by the said John H. L. C. English, is properly described as follows:

(Here follows a full description of seven tracts of land, containing nine hundred ninety-three (993) acres.)

And the personal property thereunder is described more particularly as follows:

(A full description of shares of stock and evidences of debt of the value of \$13,656.98.)

And plaintiff says the said John H. L. C. English has rented the said lands and converted to his own individual benefit and use, the use and occupation thereof which has been of the fair annual profit and value of six thousand dollars, and for this sum annually the plaintiffs are entitled to charge the said English herein, together with the earnings or interest thereon, from the date when he assumed possession thereof.

And plaintiff says that the plaintiffs, and each of them is wholly without a remedy under the strict rules of the common law, and each of them can only obtain adequate relief in a court of conscience. Wherefore, each complainant prays that an accounting be had between the said defendants, English, Finley, Robinson and Foster, and each of them, concerning the rents, issues and profits and income of all of said real estate and personal property, and that the said instrument signed by Moses Hubbard and Mary Jane Hubbard, of date January 5th, 1897, and every purported claim, judgment or right based thereupon be set aside and held for naught—that the supposed will signed by Mary Jane Hubbard and the clause 12 therein, dated February 5th, 1914, be cancelled and set aside and annulled, and held of no effect—that the title

in and to all the property in the foregoing bill of complaint be decreed to be, as also all the earnings and rentals thereof, the property of the said plaintiffs herein as heirs at law of the intestate property of Mary Jane Hubbard, deceased, and that the same be partitioned between the said heirs at law as their relative proportion therein be found and determined, which they pray may be done herein; and for such other and further relief as may appear to be just and equitable.

And each plaintiff prays for process of subpoena herein to the marshal of said court against each defendant named above to be served within this division.

(The petition is duly verified by plaintiffs) (Rec. 1-12).

The following exhibits were filed to said bill in equity:

1. Will of Mary Jane Hubbard.

I, Mrs. Mary Jane Hubbard, of the County of Collin and State of Texas, being of sound and disposing mind and memory, and being desirous to settle my worldly affairs while I have strength to do so, do make this my last will, and testament, hereby revoking all others heretofore by me made.

1st. I desire and direct that my body be buried in a decent and christian like manner, suitable to my circumstances and condition in life.

2nd. I desire and direct that my just debts be paid out of my estate without delay, by my executor to be hereinafter appointed.

3rd. I give and bequeath to my beloved niece Cora D. Spencer my home in the Town of Celina, same being lots Nos. 13-14 & 15, in Block 17, to have and to hold unto her the said Cora D. Spencer, in fee simple forever.

4th. I give and bequeath to my friend, Mrs. Sarah E. Neeley, three shares of Bank stock in the First National Bank of Celina, to have and to hold the same together with the profits and income there unto her the said Sarah E. Neeley, in fee simple forever.

5th. I give and bequeath to my loving sister Mrs. Rachael E. Kirtley my twenty shares of Bank Stock in the Celina State Bank, to have and to hold the same unto her, the said Rachael E. Kirtley, together with the profits and income thereof in fee simple forever.

6th. I give and bequeath to my loving niece, Miss Mary Emma English, One Thousand (\$1000.00) Dollars, in land notes, to have and to hold the same to her, the said Mary Emma English, forever.

7th. I give and bequeath to my esteemed friend, Mrs. Sarah E. Neeley, Five Hundred (\$500.00) Dollars in land notes, to have and to hold the same unto her, the said Sarah E. Neeley, forever.

8th. I give and bequeath to my loving nephew, Frank S. Spencer, Fifteen Hundred (\$1500.00) Dollars worth of land notes, to have and to hold the same unto him, the said Frank S. Spencer, forever.

9th. I give and bequeath to my loving niece, Mrs. Alla Hubbard, Five Hundred (\$500.00) Dollars to have and to hold the same unto her, the said Alla Hubbard Farnsworth, forever.

10th. I give and bequeath to little Miss Lorine Neeley Five Hundred (\$500.00) Dollars, to have and to hold unto her the said Lorine Neeley forever. And it is my wish and I so direct that Sarah E. Neeley, mother of little Miss Lorine, have charge of said \$500.00 and manage same to the best interest of little Lorine, and pay the same to her, together with the income thereof, when she arrives at the age of twenty-one years, or marries.

11th. I give and bequeath to my loving niece, Mrs. Cora D. Spencer, all my household goods and furnishings, to have and to hold the same unto her, the said Cora D. Spencer, forever.

12th. I give and bequeath all the residue of my property that has not been bequeathed, including my jewelry, to my loving niece, Mrs. Cora D. Spencer, to have and to hold to her in fee simple, forever.

13th. And lastly, I do nominate and appoint R. L. Clayton to be the executor of this, my last will and testament.

In testimony whereof, I have hereunto set my hand this the 5th day of February, A. D. 1914.

Mary Jane Hubbard.

Signed, declared and published by Mrs. Mary Jane Hubbard, as her last will and testament, in the presence of us, the attesting witnesses, who have hereto subscribed our names in the presence of said Mrs. Mary Jane Hubbard, at her special instance and request, this the 5th day of Feb., A. D. 1914.

J. H. L. C. English.

M. Button,

J. T. Buchanan" (Rec. 12-14).

2. Will of Moses and Mary Jane Hubbard.

"STATE OF TEXAS :

IN THE NAME OF GOD: AMEN.

COUNTY OF COLLIN :

We, Moses Hubbard and Mary Jane Hubbard, of Collin County, being of sound mind and disposing memory, mindful of the uncertainty of life and the certainty of death, wishing to dispose of the effects it has pleased Almighty God to bless us with while we have strength of mind and body so to do, do make, publish and declare this to be the last will and testament of us, and each of us, hereby revoking all others by us made, and we each direct that as each of us die this instrument shall be probated as the will of such deceased person.

Item 1st. We commend our spirits to God who gave them, and our bodies to the dust whence they came, directing our executors in this will to give us each decent burial and to erect for us a monument commensurate and suitable to our means and station in life.

Item 2nd. It is our desire and that of each of us, that as each of us dies, all the property then owned by us shall descend and vest in the following named persons, and their successors in this trust, to-wit: J. H. L. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the superintendent of Public Instruction for Collin County, who shall take and hold all the property real, personal and mixed, owned by us at the death of either of us, for the purposes, uses and trusts and as hereinafter directed and vacancies in whose number shall be filled as herein directed.

Item 3rd. Upon the death of either of us the trustees shall receive the rents, revenues and profits arising from all of said property, and shall lend all moneys having same well secured, or invest same in interest bearing bonds, rent the lands. One half the net proceeds shall be paid to any person and in any manner and for any purpose the survivor may direct. The other half shall be used and paid out in the same manner and for the same purpose as the rents and revenues of the property are herein directed to be paid and appropriated after the death of both of us, but the survivor has the right during lifetime to determine the specific manner of expenditure, that is, whether it shall be used in employment of teachers, erection of building, purchase of apparatus or other germane uses, etc.

Item 4th. Upon the death of both of us the trustees herein provided for shall take and hold all the property herein bequeathed which shall constitute and be divided into two funds, one of which shall be a permanent fund, and which shall not be lessened or diminished in any manner or for any purpose. The other fund shall be the available fund and may be expended, used and applied as directed herein. The permanent fund under this instrument shall consist of all of our real estate, stocks, notes, and cash and such additions as under the provisions of this will, may from time to time be added thereto. The additions to the permanent fund shall come from the rents, revenues, profits and interest arising from the permanent fund, and shall in no year be less than one third, but on

an average shall be one half of such rents, revenues, profits and interests, and the balance of the rents, revenues, profits and interest shall be set aside and used as an available fund.

Item 5th. Believing that we have the love of God in our hearts for the manifold blessings he has bestowed upon us, and desiring to add to the happiness and improvement of our neighbors we have founded an institution for increase and diffusion of knowledge, which we have named "ALLA," and which shall remain permanently located on the same survey on which it is located, to-wit: Wade H. Rattan, and it is our desire that the Trustees herein provided for shall use the available fund herein provided for in the employment of teachers, erection of proper and necessary buildings, the purchase of apparatus and other germane uses, and it is our desire that at this school or institution of learning all children whose parents are Caucasian and of the white race, and who are over the age of six and under the age of twenty-one shall be admitted free of tuition, but in case more apply than the funds on hand justify, then the Trustees in determining who shall be admitted are requested to give preference to worthy students who have been in attendance before residing in the school district, or adjacent thereto. The term "germane uses" is intended to receive a liberal construction, and to authorize the use of all means deemed proper by the Trustees for diffusion of knowledge, but we do not desire a sectarian school taught. The Holy Bible may be used, and we pray may be the rule and guide of both instructors and pupil.

Item 6th. The Trustees shall have no power to sell or alienate the real estate devised herein, but it shall be preserved and its rents, revenues be applied for the charitable uses, but should it be determined by the judgment of the court of competent jurisdiction after a *bona fide* trial in which nothing must be agreed upon that this limitation is invalid, then and only in that event we direct the Trustees to sell said lands and hold the proceeds as part of the permanent fund; it is however our wish that the lands shall never be sold if it be legal to hold them as here provided.

Item 7th. Confiding in the honor and integrity of J. H. L. C. English, Dr. B. F. Spencer, Dan P. English and F. S. Finley, and the person who may be Superintendent of Public Instruction for Collin County, Texas, we appoint Trustees of this fund and executors of each of our will.

Item 8th. Should we survive any of the executors or Trustee, the majority of those living may fill out by election their number to complete the number contemplated by this instrument which is five (5) and in case of death or refusal to act of any of the number at any time either at our death or at any time, the majority may fill vacancies, but the trustees must be residents of Collin County, Texas, it being our intention to create a perpetual body to this end the trustees may, if advised that it would better advance the purposes herein intended incorporate under the name of "ALLA"; no stock shall be issued.

Item 9th. It is our desire that the Trustees herein provided for, to-wit: J. H. L. C. English, Dr. B. F. Spencer, Dan P. English, F. S. Finley and the Superintendent of Public Instruction for Collin County, Texas, be not required to give bond, it is further our desire that no one be elected or act as Trustee who is not a resident of Collin County, Texas, and that a change of residence from Collin County, Texas, shall be cause for removal from Trusteeship, and the proper court is authorized and requested to require bond of subsequent Trustees, if deemed best for preservation of fund.

Item 10th. The Trustees shall have no power ever to create any debt and shall make no purchases or contract a liability beyond a present ability to pay cash.

Item 11th. It is our desire that no further action be had in the county in reference to the settlement of our estates than the probating this will of each of us, the return of an inventory and appraisement and list of claims.

Witness our hands this 5th day of January, 1897, in the presence of S. T. Cunningham, J. E. Kerr, C. E. Francis, C. B. Fields, W. A. Gossett and W. E. Francis whom we request to sign as attesting witnesses to this, our last will and testament.

Moses Hubbard,
Mary Jane Hubbard.

Witnesses:

S. T. Cunningham,
J. E. Kerr,
C. E. Francis,
C. B. Fields,
W. A. Gossett,
W. E. Francis" (Rec. 14-17).

3. An exhibit of the oath and bond of defendant, R. L. Clayton, executor of the will of Mary Jane Hubbard, and the inventory of her estate approved May 25, 1914, showing an estate of the appraised value of sixteen thousand one hundred ninety-four and 08/100 dollars (\$16,194.08), filed in the County Court of Collin County, Texas (Rec. 20-23).

4. Petition to probate the will of Moses Hubbard and Mary Jane Hubbard.

"The State of Texas, County of Collin.

*In the County Court of Collin County, Texas, July Term,
A. D., 1906.*

To the Hon. County Court of Collin County:

Now comes your petitioners, J. H. L. C. English, B. F. Spencer and F. S. Finley, J. T. Robinson, W. L. Yarbrough, and would respectfully show to your Hon. Court that Moses Hubbard departed this life in Collin County, Texas, on and about the 26th day of May, 1906; that prior to his death the said Moses Hubbard had resided in Collin County, for the space and period of about 40 years; that he owned property situated in Collin County, Texas, consisting of lands and personal property of the value of about sixty thousand dollars. Petitioners would further show that the said Moses Hubbard left a will which is herewith filed in which he nominated J. H. L. C. English, B. F. Spencer, Dan F. English, F. S. Finley, and the Superintendent of Public Instruction as executors of his will; that he provided in his will that the said executors should be residents of Collin County, Texas; that the said Dan P. English has removed from

Collin County and the said will provided that the majority of the executors should have power to fill vacancies; that said executors have nominated and appointed J. T. Robinson in the place of Dan P. English.

These petitioners would further show to the court that it was the intent and purpose of the said Moses Hubbard and of the said Mary Jane Hubbard, his wife, who also joined in the execution of the will, that they should make a joint will which should be probated at the death of each of them, and that by the terms of the will and the intent of the will the personal property on hand at the death of either of them should vest in the survivor and that upon the death of the survivor the personal property then on hand should be imposed with the trust created by the will. That a question having arisen among them these executors pray that the will be now construed and that the court in the order probating the will construe the same and give them directions as to the disposal of the personal property, and in the execution of their trust.

Your petitioners therefore pray that all proper notices be given that upon hearing said will be probated, and that the court construe the will that no bond be required of them, as the will exempts them from bond and that no further action be had except to construe return an inventory and appraisement and list of claims and probate said will.

ABERNATHY & ABERNATHY,
Attorneys for Petitioners.

Filed June 12, 1906, W. M. Shirley, Clerk County Court, Collin County, Texas, by G. E. Strother, Deputy"
(Rec. 17-18).

To which is attached the inventory of the estate devised by said last mentioned will, approved November 2, 1906, showing an estate of the appraised value of sixty-one thousand, four hundred eighty-six and 98/100 dollars (\$61,486.98) (Rec. 18-19).

5. Petition of defendant executors to remove cloud.

"State of Texas, County of Collin.

In the District Court of Collin County, Texas, February Term, 1913.

To Honorable J. M. Pearson, Judge of said Court:

Now comes J. H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, Superintendent of Public Instruction of Collin County, Texas, Trustees of Alla School Fund, hereinafter styled plaintiffs, complaining of the Christian University and Mary Jane Hubbard, hereinafter styled defendants, and represent:

That plaintiffs all reside in Collin County, Texas, and sue in their fiduciary capacity as Trustees of Alla and Alla Fund.

They further represent that Alla is an exclusive, educational and charitable institution, and is unincorporated; that the defendant, the Texas Christian University is a corporation, duly incorporated under the laws of the State of Texas, having its principal office and place of business at Ft. Worth, Texas, in Tarrant County; and that F. D. Kershner of Tarrant County, Texas, is its president.

That the defendant, Mary Jane Hubbard, resides in Collin County, Texas.

That heretofore, to-wit, on the 20th day of June, 1912, the plaintiffs were in possession of the following described property, to-wit:

(Here follows a description of field notes of the lands described in plaintiffs' bill.)

That plaintiffs, in their fiduciary capacity as hereinbefore stated, were the owners of all of said property in fee simple; that the defendants unlawfully entered upon and dispossessed plaintiffs of such premises on, to-wit, the 20th day of June, 1912, and withholds from them the possession thereof.

That the defendant, the Texas Christian University, is asserting some kind of a claim to the property which casts a cloud upon plaintiffs' title. Plaintiffs here expressly disclaim any intention of pleading their title to said property, but one link in the chain of title is a joint and mutual will of Moses Hubbard and Mary Jane Hubbard; that Moses Hubbard departed this life about May, 1906; that said will was duly filed and probated about June, 1906, a copy of which is hereto attached and marked 'Exhibit A.' That said joint will was duly executed by the said Moses Hubbard and his wife, Mary Jane Hubbard, defendant herein, under a compact, agreement and contract mutually binding upon each, and the same, after the death of the said Moses Hubbard and the probating of said will, was irrevocable by either Moses Hubbard or Mary Jane Hubbard.

That under the premises of said will the said Mary Jane Hubbard received rights, emoluments and privileges

which she would not have had but for said will; that the said Mary Jane Hubbard accepted under said will and has at all times since the probating thereof accepted and exercised those rights, privileges and emoluments, and by reason of the premises said will is irrevocable by the said Mary Jane Hubbard.

But if mistaken in the foregoing allegation, then by reason of the premises and by reason of the fact that said will was irrevocable a trust was created in behalf of the plaintiffs herein for the use and enjoyments of said premises, subject to the limitations, conditions and restrictions mentioned in the certified copy of said will hereto attached.

Wherefore plaintiffs pray that citation issue requiring the defendants to appear and answer herein and that upon final hearing plaintiffs have judgment for the title to said premises herein sued for, and that the cloud be removed from their title by reason of claims of plaintiffs herein and that the trust be declared in the plaintiffs subject to the limitations and restrictions mentioned in said will.

Plaintiffs further pray for all general, special and equitable relief.

G. R. SMITH,

W. R. ABERNATHY,

Attorneys for Plaintiffs" (Rec. 24-27).

(To which is attached the joint will of Moses and Mary Jane Hubbard, a copy of which is attached as Exhibit 2 to plaintiffs' bill.) Which petition was filed in the District Court of Collin County, January 11, 1913, and the suit styled *J. H. L. C. English, et al., v. Texas Christian University, et al.* (Rec. 27-30).

Motions Questioning Jurisdiction and Answers of Defendants.

"Now come the defendants, John H. L. C. English, F. S. Finley, J. T. Robinson, W. E. Foster and District Trustees of District No. 67 in Collin County, Texas, and represent and show to the court.

First.

That there is a misjoinder of causes of action as set forth in plaintiffs' bill in the following respects, to-wit:

Said bill shows upon its face that the same is a bill to contest the will of Moses Hubbard, dated January 5th, 1897, and by virtue of which John H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, as Trustees, and District Trustees of District No. 67, hold the lands described in plaintiffs' petition and the rents and revenues derived therefrom, less the amounts paid Mary Jane Hubbard in her lifetime for the Alla School, and that defendants Cora D. Spencer and Robert L. Clayton have no interest whatever in that subject of litigation, and that the liability is not one asserted against Cora D. Spencer and Robert L. Clayton, but against said defendants' Trustees, and District solely, and that said bill is also brought for the purpose of annulling and setting aside the probate of the will of Mary Jane Hubbard, under and by virtue of which the defendant Cora D. Spencer as residuary legatee became the owner of certain real estate and personal property, and that the defendants' Trustees and District hereinbefore named, are in no way liable on any feature of the bill.

That the rights and interests of Cora D. Spencer can in no manner be affected by the setting aside and annulling the probate of the will of Moses Hubbard, and the rights and liabilities of said defendants, as Trustees, and said District, can in no manner be affected by setting aside the probate of the will of Mary Jane Hubbard, deceased, wherein Cora D. Spencer is legatee.

Wherefore said defendants move the court to dismiss this action for misjoinder of causes.

Second.

Said defendants herein move the court to dismiss this cause of action for misjoinder of parties defendant, it appearing from the face of the bill that the defendants' trustees and said District hereinabove named, have no interest in the probating or the annulling of the will of the said Mary Jane Hubbard as sought by said bill, and that defendants, Cora D. Spencer and Robert L. Clayton, have no interest in the probating or annulling the probate of the will of Moses Hubbard, deceased. Wherefore defendants pray the court to dismiss the bill for misjoinder of parties defendant.

Third.

This bill is brought for the purpose of contesting the probate of the will of Moses Hubbard, deceased, and for the purpose of contesting, annulling and setting aside the probate of the will of Mary Jane Hubbard, deceased.

Said defendants represent and show to the court that heretofore, on to-wit: the day of

A. D., 1906, the last will and testament of Moses Hubbard was admitted to probate in the County Court of Collin County, Texas. That said County Court of Collin County, Texas, sitting as a probate court, had jurisdiction of the subject matter and of the estate and duly admitted to probate as the last will and testament, the will of Moses Hubbard, deceased, a copy of which is filed as an exhibit with complainants' bill.

That heretofore, to-wit, on the day of A. D., 1914, the County Court of Collin County, Texas, sitting at probate, admitted to probate the last will and testament of Mary Jane Hubbard an instrument a copy of which is attached to the exhibit filed by complainants with their bill herein.

That the County Court of Collin County, Texas, has and had the exclusive jurisdiction in all probate matters, and that said court of Collin County, Texas, sitting at probate is the only court having original jurisdiction to hear and try any contest of the probate of either of said wills.

That there is no statute of the State of Texas, to authorize any court of general jurisdiction to entertain original jurisdiction of the contest of either of said wills, and that all proceedings in said court of original probate jurisdiction or proceedings *in rem* are binding upon the whole world, whether parties thereto or not.

Wherefore said defendants say that this court has not jurisdiction to hear and determine this matter, but that the County Court of Collin County, Texas, has the

exclusive original jurisdiction to hear and determine the contest of said will.

Wherefore they pray this court that this cause be dismissed for the want of jurisdiction.

Fourth.

The plaintiffs' bill shows upon its face that there is not that diversity of citizenship as will give this court jurisdiction of the subject matter in this:

It seeks for a partition of the property described in said bill and it appears from the allegations of the bill that the defendant, Cora D. Spencer, is entitled to a distributive share of any sum or sums which plaintiff might recover therein.

The petition alleging that complainants in the case are non-residents of the State of Texas, and also alleges that Cora D. Spencer is a resident citizen of Collin County, Texas, said petition alleging that complainants, Albert E. Sutton, DeLana M. Sutton and Rachael E. Kirtley, are the brothers and sisters of Mary Jane Hubbard, deceased, and are each entitled to $\frac{1}{4}$ distributive interest in her estate.

Said petition further alleging that Elizabeth E. Davis, George D. Sutton and Ida Krickbaum, and the defendant, Cora D. Spencer, are the children of a deceased brother of Mary Jane Hubbard, and as such each would be entitled to a $\frac{1}{16}$ distributive interest in any sum or sums that plaintiffs may recover herein.

Wherefore said defendants say that said petition shows upon its face that there is not that diversity of

citizenship as would give this court jurisdiction. They pray this court to dismiss this cause for the want of jurisdiction, it appearing that there is no diversity of citizenship.

Fifth.

And for answer herein these defendants each deny that there is such a diversity of citizenship between the parties interest(ed) herein as would give this court jurisdiction.

These defendants deny that the amount in controversy is one hundred and sixty-four Thousand dollars. These defendants deny that the amount in controversy on the part and behalf of each complainant is as much as six thousand dollars.

These defendants deny that this action is for the construction of a will, but they aver on the contrary it is an action to contest the validity of the will of Moses Hubbard and the will of Mary Jane Hubbard, and that it is a partition suit in which they seek to recover for and on behalf of the plaintiffs who were non-residents of the State, and defendant, Cora D. Spencer, against the defendants' trustees and District hereinabove mentioned.

Said defendants deny that any of the complainants or the defendant, Cora D. Spencer, are the heirs at law of Moses Hubbard. Defendants deny that Moses Hubbard was entirely without means or property when he settled in Collin County, Texas, but on the contrary aver that at the time of his marriage and subsequent thereto he acquired a large amount of property by gift, demise

and descent, and the same was under the laws of Texas his separate property; and defendants deny that all of the property described in plaintiffs' petition was the community property of Moses Hubbard and Mary Jane Hubbard.

Defendants deny that the community estate was of the value of one hundred thousand dollars. Defendants deny that the personal property consisting of notes, stock, etc. was of the value of one hundred thousand dollars. Defendants deny that the community property of Moses Hubbard descended unto the community survivor the said Mary Jane Hubbard, but on the contrary defendants aver that on, to-wit, about the day of, A. D., 1897, the said Moses Hubbard and Mary Jane Hubbard made and published their joint will, a copy of which is attached to the exhibit filed with complainants' bill. That by the terms of said will said Moses Hubbard and Mary Jane Hubbard devised and bequeathed their entire estate, both community and separate, to the defendants' trustees and District herein and their successors, all of the real and personal estate belonging to each and both of them, reserving to the survivor one-half of the revenue arising therefrom, directing that said trustees take possession of all of said property, real and personal, rent the same out and collect the rents, paying to the survivor one-half of the same for his own use and benefit, and providing that the other one-half should go for the purpose and maintenance of a Charitable Institution of learning known as Alla School, and pro-

viding that the survivor might direct how the other one-half of said proceeds should be spent, whether for the paying of teachers, erecting of buildings, or purchase of equipments.

That said will after death of Moses Hubbard was duly probated in the County Court of Collin County, Texas, said court having jurisdiction of the parties and subject matter, and that the survivor, Mary Jane Hubbard, acquiesced in said probate and procured the probate thereof and accepted it under said will and received benefits, emoluments, rights and privileges that she would not have had but for said will, and she exercised said rights, privileges, etc. by reason whereof said will insofar as Mary Jane Hubbard was concerned was irrevocable.

Defendants deny that at the time Mary J. Hubbard executed the will disposing of the property acquired after the death of Moses Hubbard, which complainants seek to contest in this suit, and while she was in the very article of death, made and executed said will. Plaintiffs deny that she, the said Mary Jane Hubbard, was persuaded and influenced into the execution of said will, but on the contrary say that the said Mary Jane Hubbard at the time of the execution of said will was of sound, disposing mind and memory, and that she was a woman far above the ordinary in educational attainments, a woman of excellent sense and judgment, and in all respects fully capacitated to comprehend and know the extent and value of her estate, the objects of her bounty, and to remember each and every relative, especially the complainants herein.

Plaintiffs further aver that the disposition by the said Mary Jane Hubbard of her said property in said will, was a reasonable and natural disposition. Defendants deny that at the time of the execution of said will, the said Mary Jane Hubbard was clouded in intellect, they deny that she was not of a sound and disposing mind and memory, they deny that she did not remember the plaintiffs, but that at the time of the execution of said will was in the full possession of her mental faculties, and knew and appreciated the business at hand, the nature and extent of her estate and objects of her bounty.

Defendants deny that plaintiff Rachael E. Kirtley was forgotten by the said Mary Jane Hubbard, and deny that she was suggested by John H. L. C. English, or any other person. They deny that said John H. L. C. English, suggested every other item of said will, or any item of same. They deny that the mind of said Mary Jane Hubbard at the time of signing said will, was weak and imbecile to the extent that she did not comprehend the contents of it, but on the contrary they aver that she did comprehend the contents of it, and the same was written at her dictation and prepared under her directions.

Defendants deny that she was induced to sign said will by the undue influence of the defendant English, but on the contrary they say that said English in no manner attempted to influence her actions, and in no manner attempted to dictate any item, term or condition of said will, and defendants deny that said English had

any purpose or motive so to do. On the contrary, they aver that the said English married the sister of Moses Hubbard and that he has a child by said sister who was a niece of Moses Hubbard and a niece of said Mary Jane Hubbard by marriage and that the said Moses Hubbard devised no part of his estate to the daughter of said English or the wife of said English, and that Mary Jane Hubbard by her will, without suggestion from anyone did leave a legacy of \$500.00 to the daughter of said English, who was a niece by marriage of the said Mary Jane Hubbard, and notwithstanding the near relation to the said Moses Hubbard and Mary Jane Hubbard, this is the only property of the estates of either of them that was left to any relative of the said English.

They deny that said will should be annulled, set aside and held for naught, or any part of the same. They deny that in the event that the court should hold that the plaintiffs are entitled to recover herein, that the same should be divided as set forth in complainants' bill, to-wit: One-fourth to Rachael E. Kirtley, $\frac{1}{4}$ to Albert E. Sutton, $\frac{1}{4}$ to DeLana M. Sutton, $\frac{1}{16}$ to George D. Sutton, $\frac{1}{16}$ to Elizabeth E. Davis, $\frac{1}{16}$ to Ida Krickbaum and $\frac{1}{16}$ to Helen M. Marshall, but on the contrary they aver that Cora D. Spencer is a sister of George D. Sutton, Elizabeth E. Davis and Ida Krickbaum, and in the event of a partition that the said George D. Sutton, Elizabeth E. Davis and Ida Krickbaum each be entitled to a $\frac{1}{20}$ of said property so partitioned.

Defendants deny that complainants are entitled to any part of said estate, or entitled to any partition herein. Defendants deny further that for many years prior to the decease of Mary Jane Hubbard that she was not stable in her actions or determinations, and full mistress of herself or her acts nor her property. Defendants deny that she was unduly influenced, or in any way influenced by the defendant English, deny that she was absolutely subject to the control of defendant English, or any way subject to his control.

Defendants deny that said English managed and controlled and dictated to her concerning her property, without respect to her will or interest or in any other manner. They deny that defendant English compelled her to submit to his control. Defendants deny that he substituted his will for hers in any actions for a long period of years or in any actions at any time.

Defendants deny that he exercised any malignant control or any other control during his lifetime, over the said Moses Hubbard. They deny that said influence was actuated by his fostering, encouraging and catering to a mania of the said Moses Hubbard in his lifetime, and his adjuration relative thereto after the death of Moses Hubbard were imposed and coerced upon the mind of said Mary Jane Hubbard; they deny that he overpowered her will and wishes as to said community property or any other property, but on the contrary defendants aver that both Moses Hubbard and Mary Jane Hubbard were of exceptional mental attainments, that

Moses Hubbard was a practicing physician engaged in active practice of his profession for many years after the execution of said will, was honored and respected in the neighborhood for his ability as a physician and for his sound business methods and his good judgment. That he acquired and accumulated the greater part of his estate in the immediate neighborhood where he lived and where he established the Alla School, that some years prior to his death he built a commodious school building at his own expense, one sufficient to satisfy all the needs and requirements of the school at that time, that he purchased and constructed two additional buildings situated on said land to be used as homes for said teachers; that he supplemented the teachers' salaries in order to procure efficient teachers and paid them their salaries out of his own means to extend and prolong the school to a term of eight months in each year. That he was a person of strong mind and good judgment, and he and his wife desired that the fortune they had accumulated in that neighborhood should go back to the benefit of the neighborhood which induced them to provide an indorsement of said school and provide for its needs and support largely.

Defendants deny that Moses Hubbard was subject to a mania or unsound idea relative to the memory of his deceased daughter, Alla Hubbard Spencer. They deny that he was controlled by any mania in his investments and transactions. Defendants deny that he spent a considerable amount of money, or any amount of

money to procure the manufacture of a brand of flour called the Alla brand, they deny that there ever was such a brand of flour known as the Alla brand, but if mistaken in this, they say that the said Dr. Moses Hubbard was not instrumental in procuring a brand of flour by that name, nor was it named after his daughter.

Defendants aver that it is true that the said Moses Hubbard and Mary Jane Hubbard by their joint will, did dispose of their entire property subject to an interest to the survivor of one-half the revenues derived therefrom, for the indorsement, maintenance and support of the Alla School as set forth in the will, a copy of which is filed with complainants' bill, by the terms of which they did establish a charitable trust.

They deny that the same is a perpetuity in contravention of the laws of the State of Texas, but aver that it was specifically mentioned in said will, that in the event it should be decided that said trustees could not hold said lands without contravening the laws and constitution, then the same be sold and the proceeds be applied to said charitable trust.

Defendants deny that said trust is void because it is indefinite as to the parties beneficiary. They deny that said trust is void because the maker of said will had established no institution and none came into existence except at defendants' directions. On the contrary they aver that said institution had been established, a house erected and for a long time prior to the making and execution of said will said Moses Hubbard and Mary

Jane Hubbard out of their common funds had maintained the same as hereinafter alleged.

Defendants deny that said trust is void because it is beyond the power of the defendants named as trustees to admit or compel or procure the attendance therein of non-resident scholars beyond the scholastic age, but on the contrary they aver that said trust was for the benefit of all Caucasian children between the ages of 6 and 21 years in the event more applied than the funds would accommodate, directing the trustees to give preference to those who had attended the school, those who lived in the district or adjoining district. They deny that said trust is void for the reason that Moses Hubbard and Mary Jane Hubbard were constituted therein as intermediate beneficiaries ahead of said trust, but on the contrary they aver that said trustees were directed to take charge of said property upon the death of either of them, rent the same, collect the rents, revenues, interest, etc., and apply one-half the proceeds to the maintenance and support of said school, rendering the other one-half to the survivor. That in truth and in fact, on to-wit, the year 1906, after the probate of the will of said Moses Hubbard, said trustees did take possession of all of said property, holding the same adverse to the whole world, and proceeded to carry out the trust as established and directed by the will of said Moses Hubbard.

Defendants further deny that said trust is void because the said Moses Hubbard was not of sound and disposing mind and memory, but they aver on the con-

trary that the said Moses Hubbard was of sound and disposing mind and memory, a man of excellent judgment, wide experience, thoroughly educated and an able and active practicing physician at the time of the execution of the said will, and for many years thereafter.

Defendants deny that said trust was void for the further reason that the said purported will did not contain language whereby any gift or devise or conveyance was made and became the property therein referred to was all community property.

Defendants deny that said survivor was to become and did become the sole owner and free from the testamentary disposition of said property. They deny that no testamentary disposition was made by the said Moses Hubbard, they deny that there was then and there created a naked trust whereof the said Mary Jane Hubbard was sole beneficiary, they deny that the trustees therein had no interest; they deny that said trust was executed and determined for the sole benefit of said Mary Jane Hubbard.

Defendants deny that the defendant trustees never sought a settlement with the executor over the will and never received nor receipted thereunder with the executors for any of the property, and that they never until the proceedings hereinafter related, made claim to any person related nor at any time as trustee; they deny that they attempted to make private use of said property, both real and personal, or either of them, without authority either in law or in equity. They deny that they con-

verted the property and the proceeds thereof unto the private use and benefit of said English.

Defendants deny that to that end they converted and conveyed a portion of said property and real estate whereof he took title unto himself, through the said conversion *ex maleficio* of 515.18 acres located in Denton County, State of Texas, and described in complainants' bill, but they aver the facts to be that the deceased owned about 71 shares of stock in the D. C. Telephone line of the face value of \$10.00 per share. That the defendant, J. H. L. C. English, owned 656 shares of said stock. That divers and different persons had small holdings of stock in the said D. C. Telephone Line. That the said D. C. Telephone Line was not a paying institution and it was the interest of the estate as much as to the other holders of stock in said D. C. Telephone Line to dispose of same. They got an opportunity to trade the entire capital stock of said Telephone Line for 515.18 acres of land. That as there were numerous persons interested in the stock in small amounts, the said John H. L. C. English owning more than a majority of all of the stock, it was agreed that the title should be taken in his name to facilitate a transfer of the same whenever it could be sold, and the said J. H. L. C. English took the said title in his own name at the instance of the different parties as they appeared, including the trust estate held by said trustees.

That he attached to said deed a statement of the interest held by each, respectively, so that upon a sale of

the land, each stockholder including the trust estate held by the Trustees could receive their proportionate shares of the proceeds thereof. That said act was done in good faith and simply for the convenience of a transfer when they might find a purchaser for said land, the same was understood and agreed by the stock holders of said D. C. Telephone Company.

Defendants deny that the suit instituted in the District Court of Collin County, Texas, was an attempt to increase the possession and control of said English, but on the contrary they aver that Mary Jane Hubbard by a deed duly executed, attempted to convey to the Texas Christian University, a corporation located at Fort Worth, Texas, some interest in the trust property held by said Trustees for the benefit of Alla School. That thereupon in order to remove cloud from title and to establish the right of said Trustees in and to all of said property, the said Trustees caused to be instituted in the District Court of Collin County, Texas, a court of general jurisdiction, the same having the jurisdiction of the subject matter and of the persons thereto, a suit against Texas Christian University and against Mary Jane Hubbard to cancel said deed of conveyance to said Texas Christian University to remove cloud from title of said trust estate, and to have said lands and property declared to be the property of the Alla School and of the Trustees controlling the same for said Alla School, divesting all titles out of the Texas Christian University and Mary Jane Hubbard in and to the lands involved in this litigation.

That citation was issued in said cause and the said Mary Jane Hubbard answered therein as defendant denying any interest in and to said property save and except her interest in one-half the proceeds thereof during her lifetime and judgment that was had against her on said answer and disclaimer, and a judgment was had against said Texas Christian University divesting all rights, title and interest of the T. C. U. and Mary Jane Hubbard in and to said lands, and vesting the said title in and to the said Trustee of said Alla School in and for the benefit of said school.

That the said cause was tried before the Honorable F. E. Wilcox, special judge, and agreed upon by the parties to try said cause, F. E. Wilcox, a practicing attorney for more than 20 years' standing in the McKinney Bar, the presiding judge at that time of said court being disqualified to try the same, that the said F. E. Wilcox qualified as special judge, took the oath of office and tried said cause and rendered the judgment therein, which is of record, an exemplified copy of proceedings and judgment as well as an exemplified copy of the will and probate thereof of Moses Hubbard and an exemplified copy of the will and probate thereof of Mary Jane Hubbard will be filed as soon as the clerk can prepare a transcript of the same, and we ask that the same be considered a part of this bill as though the same were copied in it.

Defendants allege that not sufficient time is allowed up to the day they are required to answer herein for

the clerk of the court to prepare said copies, and they ask the indulgence of the court permitting said copies to be filed as soon as it is possible for them to be prepared and certified to. That the records of said case and the probate of said will is in the County Court of Collin County, Texas, and the record of said cause tried in the District Court is of record in said cause between trustees and Texas Christian University and Mary Jane Hubbard in the records of the District Court of Collin County, Texas.

Defendants deny that said Mary Jane Hubbard had no notice of said actions and proceedings, they deny that she was in any manner deceived into signing a purported waiver and disclaimer therein, and deny that the same was without the knowledge and understanding of the said Mary Jane Hubbard; deny that any chicane or deceit was practiced on Mary Jane Hubbard or anyone else; they deny that the same was wholly without consideration or was void or was a misuse of the forms of law; they deny that said judgment was never given or signed by any judge or person possessing judicial power within the State of Texas. On the contrary they aver that said Judge F. E. Wilcox was an active practitioner of law in McKinney, Texas, and had been for more than 20 years, that he was duly selected and qualified to try said cause, because of the disqualification of the judge presiding, that he accepted said appointment, took the oath of office, tried and adjudicated the case with all the due forms of law, and said judgment is in all respects valid

and binding and forever divested out of the said Mary Jane Hubbard any interest that she may have had in and to said lands, except the right to receive one-half the rents and revenues during her lifetime. They deny that said District Court had not jurisdiction in the first instance.

Defendants deny that any petition was pending in the County Court for the construction of said will, and they aver that if any such petition had ever been filed that the same was dismissed and abandoned, the same having never been called for trial and no order ever having been made in the same for more than four years after the filing of same, if any was filed. They deny that said court had jurisdiction in the first instance to construe a will, and if it ever had jurisdiction to construe the same, and if any motion ever had been filed therein, the same had been dismissed and abandoned, by not having been called, continued or tried within four years after the filing of same.

Defendants deny that the judge who assumed to act and did act was without power or authority from any cause to try the same, but they aver on the contrary that he was duly and legally selected and agreed upon by the parties; the heirs, legal representatives and assigns are now estopped from in any way impeaching said judgment.

Defendants deny that any of said real estate was originally usurped by the said J. H. L. C. English, but they aver the fact to be that all of said real estate was

taken possession of by said Board of Trustees, defendants herein, immediately after the probating of the will of Moses Hubbard in 1906, it was taken possession of by virtue and under the authority of said will, and said Trustees have owned, held, controlled and had the actual possession of same, holding the same under title and paying taxes on the same and holding the same adverse to the whole world for more than three years next before the filing of this suit; they further aver that by reason of which plaintiffs' claim is barred by the statute of limitation.

Defendants further aver that the said John H. L. C. English and the other Trustees named herein, immediately after the probate of the will of said Moses Hubbard took possession of all of said premises under and by virtue of said will, a recorded instrument in Collin County, Texas, and have held the same in their actual possession, paid all taxes on same for more than five years prior to the institution of this suit, and have held the peaceable and adverse possession thereto for more than five years prior to the filing of this suit, and plaintiffs' claim, if any they ever had, is barred by the statute of five years' limitation, and further herein plaintiffs aver that the said John H. L. C. English and the other Trustees named herein, took actual possession of all of said lands and personal property described in complainants' bill on, to-wit, the day of A. D. 1906, under and by virtue of the will of the said Moses Hubbard which had theretofore been duly pro-

bated and duly recorded in the probate records of Collin County, Texas, and held the peaceable and adverse possession of same from said date up to the filing of this suit, which is more than eight years, and plaintiffs herein were apprised of said holding and apprised of said possession, they have acquiesced therein, said trustees having paid all of the taxes thereon and exercised ownership to the exclusion of the entire world, wherefore they say complainants' claim is invalid and demands therefrom a stale demand, and by reason of said limitation and stale demand they are precluded from recovering herein.

Defendants deny that said John H. L. C. English has converted to his own use and benefit the rents of said land, deny that the use and occupation of said land has been of the fair and annual profits of the value of six thousand dollars, and that the plaintiffs are entitled to charge said sum annually to the said English together with the earnings and interest thereon from the date when he assumed possession.

Defendants further deny that plaintiffs are without remedy at law, but on the contrary aver that the Probate Court of Collin County, Texas, a court having exclusive jurisdiction in probate matters, is open to them." (Signed by counsel.) (Rec. 31-41.)

To which motions and answers were attached the following exhibits:

1. Judgment probating the will of Mary Jane Hubbard.

"Thursday 14th, May 1914.

"At a regular term of County Court of Collin County, McKinney, on Monday the 12th day of April, 1914.

Present and Presiding Hon. H. L. Davis, Co. Judge.
Pearl Strother, County Clerk.
A. Robertson, Sheriff.

The following proceedings in Probate were had:

In the Matter of Estate of Mary Jane Hubbard, Dec'd.
No. 2476.

On this 14th day of May, A. D. 1914, came on to be heard the application for the probate of the last will and testament of the deceased, and for letters thereon, filed herein, on the 11th day of March, A. D. 1914.

And it appearing to the court that legal notices of the filing of said application have been issued and posted in the manner and for the length of time required by law and no one came to contest the same; and it further appearing from the testimony of the subscribing witnesses to said will, sworn to and subscribed in open court, and filed herein, that said Mary Jane Hubbard, deceased, died in the County of Collin, in the State of Texas, where her residence and principal estate was situated, on the seventh day of February, A. D. 1914, that said deceased, at the time of executing said will, was over 21 years of age, and of sound mind; that said will was executed with the formalities and solemnities, and under the circumstances required by law to make it a valid will; that said will has not been revoked by said testator.

It is therefore ordered and decreed by the court that said will is hereby proven and established as the last will and testament of said Mary Jane Hubbard, deceased, and that R. L. Clayton, named in said will, be and is appointed executor of said will and estate, and bond set at \$20,000.00, and that J. H. L. C. English, Mr. Button and J. F. Buchanan are appointed appraisers of said estate" (Rec. 47).

(To which is attached the will of Mary Jane Hubbard, a copy of which appears as exhibit 1 to the bill of plaintiff.) (Rec. 47-8.)

2. Petition to probate the will of Moses and Mary Jane Hubbard (which appears as exhibit 4 to plaintiffs' bill) (Rec. 42). The judgment probating the same is as follows:

"Estate of Moses Hubbard, Deceased.

July 31st, 1906.

Now on this day came on to be heard the application of J. H. L. C. English to probate the last will and testament of Moses Hubbard, and came the applicant in person, and by attorney, and it appearing to the court that the application to probate said will had been filed more than 20 days before the first day of this term of said court, and that notice of the filing of said application had been given in the manner for the length of time required by law, and no protest or objection having been filed, and it further appearing to the court that the testator was over the age of twenty-one years, and that he was of sound mind and memory, and that said will had been executed under the forms and with the

solemnities required by law, and the court being fully satisfied in the premises, it is ordered, adjudged and decreed by the court that the papers herein filed in this court, bearing the day of be established according to its terms and provisions as the last will and testament of Moses Hubbard.

It is further ordered that J. H. L. C. English, B. F. Spencer and W. L. Yarbough be, and they are hereby appointed executors of the last will and testament of Moses Hubbard, dec'd.

It is further ordered that they be required to give no bond in said administration.

It is further ordered that A. Callahon, J. W. Kerr and S. J. Lewis be appointed appraisers of said estate and that the clerk of this court record same" (Rec. 46).

3. The oath and selection of special judge, disclaimers and judgment in cause No. 7072, styled J. H. L. C. English *et al.* vs. Texas Christian University *et al.*

"OATH OF OFFICE.

I, F. E. Wilcox, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me, as special district judge, to try cause No. 7072, in the District Court of Collin County, Texas, J. H. L. C. English *et al.* vs. Texas Christian University *et al.*, according to the best of my skill and ability, agreeable to the Constitution and laws of the United States, and of this state; and I do solemnly (swear) that, since the adoption of the Constitution of the State, I, being a citizen of this State, have not fought a duel with deadly

weapon, nor have I acted as second in carrying a challenge, or aided, advised or assisted any person thus offending; and I further swear that I have not, directly nor indirectly paid, offered or promised to pay, contribute or promised to contribute, any money or valuable thing, or promised any public office or employment for the giving or withholding a vote at the election at which I was elected.

SO HELP ME GOD.

F. E. Wilcox.

Subscribed and sworn to before me, this the 22d day of February, 1913.

(L. S.)

A. S. Wheatley,

Clerk District Court, Collin County, Texas.

By F. K. Sneed, Deputy.

Saturday, February 22d, 1913. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

Now on this day came on to be heard the above entitled cause, and whereas Honorable J. M. Pearson, the duly elected and qualified District Judge for the 59th Judicial District, is sick and unable to hold court, and whereas, G. R. Smith, attorney, of this bar, has been duly and legally chosen as such judge to hold this term of the District Court in Collin County, Texas; and whereas, said G. R. Smith is disqualified from trying the above entitled cause, he being of counsel for plaintiff, and whereas, by reason of the premises there can be no exchange of judges, and whereas, there appears filed among the papers in this cause instruments in writing duly signed by

all of the parties hereto, plaintiffs and defendants, in which it is agreed that the Honorable F. E. Wilcox, an attorney of this bar, be selected and is hereby selected for the trial of said cause. And he having duly taken the oath of office thereupon the parties hereto announce ready for trial.

And it appearing to the court that said agreement is in words and figures as follows, to-wit:

In the District Court of Collin County, Texas, February Term, 1913. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

It is hereby agreed by the Texas Christian University, one of the defendants in the above entitled cause, that Honorable F. E. Wilcox may and shall act as special judge in this cause, and that this defendant will be fully bound by all his acts in the premises as judge of the court aforesaid, in the said cause.

(Signed) FLOURNOY, SMITH & STORER,
Attorneys for Defendant, Texas Christian University.

No. 7072. In District Court Collin Co. J. H. L. C. English et al. vs. Texas Christian University.

Agreement by Deft. Texas Christian University for Special Judge.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin County, Texas. By F. K. Sneed, Deputy.
No. 2.

J. H. L. C. English et al., Trustees, vs. Texas Christian University et al. No. 7072.

I, Mary Jane Hubbard, one of the defendants in the

above styled and numbered cause, come now and agree and select F. E. Wilcox to act and sit as special judge in the trial of said cause.

(Signed) M. J. Hubbard.

Witnesses:

Robert L. Clayton.

M. Button.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin County, Texas. By F. K. Sneed, Deputy.

Suit pending in the District Court of Collin County, Texas. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

Now comes the plaintiff herein, J. H. L. C. English *et al.*, in the above styled and numbered cause and agree and hereby select Judge F. E. Wilcox as special judge in the above cause.

G. R. SMITH,

W. R. ABERNATHY,

Attorneys for Plaintiffs, J. H. L. C. English et al.

Filed Feb. 22, 1913, J. H. L. C. English, Trustees, vs. Texas Christian University *et al.*

And whereas, the Honorable F. E. Wilcox has accepted said position as judge to try this cause and has duly taken the oath of office on file with the papers of this cause, and a jury being waived and the matters of fact as well as of law being submitted to the court, and the court after hearing the pleadings, and it appearing to the court that the plaintiffs' cause of action is for trespass to try title and to remove cloud from title; and it appearing to the court that the defendant, Texas Christian

University, has filed a disclaimer herein disclaiming all right, title and interest to any of the lands sued for in words and figures as follows, to-wit:

In the District Court of Collin County, Texas, February Term, 1913. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

Now comes Texas Christian University, one of the defendants in the above cause, by attorney and says:

That it disclaims all and any interest, title or estate of whatsoever character in the lands described in plaintiffs' petition herein, and in any property made the subject matter of this suit, and prays to be dismissed, hence with its costs, on this disclaimer.

(Signed) FLOURNOY, SMITH & STORER,
Attorneys for Defendant, Texas Christian University.

No. 7072. In District Court Collin Co. J. H. L. C. English et al. vs. Texas Christian University et al.

Disclaimer by Defendant, Texas Christian University.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin Co., Texas. By F. K. Sneed, Deputy.

And it further appearing to the court that Texas Christian University has been duly and legally cited to appear and answer herein and in time to require an answer to this term of the court, and that no answer has been filed herein, except said disclaimer.

And it further appearing to the court that Mary Jane Hubbard, the other defendant herein, has also filed a disclaimer herein, disclaiming in favor of plaintiff any

and all right, title and interest in and to the land sued for subject to her rights to receive one-half of the rents and revenues of said property during her life time and subject to her right to direct the disbursement of the other half, during her life time, as provided for in the will of Moses Hubbard, deceased, a copy of which is attached to plaintiff's original petition. The disclaimer of Mary Jane Hubbard is as follows, to-wit:

Suit pending in the District Court of Collin County, Texas. J. H. L. C. English et al. vs. Texas Christian University et al. No. 7072.

I, Mary Jane Hubbard, one of the defendants in the above styled and numbered cause, come now and disclaim in favor of plaintiffs any and all right, title or interest in and to any of the lands set out and described in plaintiffs' petition, except as herein specified; and agree that judgment may be rendered in favor of plaintiffs as prayed for in their petition, subject to my rights in the rents, revenues and profits arising from said lands.

M. J. Hubbard.

Witnesses:

Robert L. Clayton.

M. Button.

Filed Feb. 22, 1913, A. S. Wheatley, Clerk District Court, Collin County, Texas. By F. K. Sneed, Deputy."

And all parties having announced ready for trial, it is therefore considered by the court that plaintiffs herein, to-wit, J. H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, Superintendent of Public Instruction of Collin County, Trustees of Alla School, in their

fiduciary capacity should have and recover the title and possession of the lands described in plaintiffs' original petition as follows, to-wit:

(Here follows a description by field notes of the land devised in the will of Moses and Mary Jane Hubbard.)

It is further considered by the court that any cloud cast upon plaintiffs' title by reason of the claim of defendants or either of them should be removed subject, however, to the right of Mary Jane Hubbard to receive a life interest in the rents and revenues as hereinabove stated.

It is therefore ordered, adjudged and decreed that plaintiffs, J. H. L. C. English, F. S. Finley, J. T. Robinson and W. E. Foster, Superintendent of Public Instruction of Collin County, as trustees of Alla School Fund in their fiduciary capacity as such, do have and recover of and from the Texas Christian University, the title and possession of the land hereinabove described, and that any cloud cast upon said title by reason of any adverse claim of the said Texas Christian University be and the same is hereby removed.

It is further ordered, adjudged and decreed by the court that the plaintiffs herein named, and in the capacity herein stated, do have and recover of and from the defendant, Mary Jane Hubbard, the title and possession of the lands hereinabove described; and it is further ordered, adjudged and decreed that the cloud cast upon the title of said lands by reason of any adverse claim of the said

Mary Jane Hubbard, be and the same are removed except insofar as she is entitled to receive one-half of the rents and revenues during her natural life derived from said property, and except insofar as she has the right to direct the disbursements of the other half of said revenues, during her natural life as provided in the will of Moses Hubbard, deceased, duly probated in the County Court of Collin County, Texas.

It is further ordered, adjudged and decreed that plaintiffs above named do have and recover of and from the defendants above named judgment of their disclaimer as herein filed.

It is further ordered, adjudged and decreed that the plaintiffs herein above named and in their fiduciary capacity, be taxed with all cost incurred herein by reason of the disclaimer of said defendants, for all of which let execution issue." (Rec. 49-51.)

Answer of Defendants, Cora D. Spencer and Robert L. Clayton.

"Now come the defendants, Cora D. Spencer and Robert L. Clayton, and for answer herein represent and show to the court:

I.

Said defendants adopt the motions, denials and answers this day filed in this court by defendants, John H. L. C. English, et al, as their motions, denials and answers herein.

II.

Said defendants say that on the day of 1914, when the will of Mary Jane Hubbard was offered for probate in the County Court of Collin County, that these plaintiffs and their representatives filed in said court a contest of the validity of said will; that thereafter and before said will was admitted to probate, said plaintiffs and their representatives in open court admitted the testamentary capacity of Mary Jane Hubbard, and the validity of her will, and that such admission so made in open court became, was and is a part of the judgment in probating said will, and that these plaintiffs are estopped now to say that said will or any of its provisions is invalid.

III.

Said defendants say that they do not question the validity of the wills of Moses Hubbard or Mary Jane Hubbard, and that they have no desire that the property of said Moses Hubbard and Mary Jane Hubbard shall go in any other way than as directed in their respective wills. But said defendant, Cora D. Spencer says that if upon the hearing of this case the court shall be of the opinion that said wills are invalid, and that the estates of Moses Hubbard and Mary Jane Hubbard descend to their heirs, and are subject to partition, then she asks the court that one-twentieth ($1/20$) of said estate be set apart to her as a grandchild and heir of Mary Jane Hubbard, deceased, and for such other and further relief as she is entitled to in the premises."

(Said answer was duly signed by counsel.) (Rec. 55-6.)

Before the disposition of the case, plaintiffs propounded interrogatories to defendants and others, under Equity Rule 58, which were duly answered in reference to the receipts and disbursements of revenues arising from the trust funds in their hands, but the same are not deemed pertinent to the questions herein presented (Rec. 56-71).

Judgment on Motions to Dismiss.

"In this cause came on for hearing upon the bills of complainants with the exhibits, and the answers of the defendants with the exhibits, and the interrogatories of complainants propounded to the defendant, English and Trustees, and the answers of said English and Foster and Gossett to these interrogatories, and was argued upon the demurrers of the defendant contained in said answers upon the several grounds assigned therein, Allen G. Fisher, *Esq.*, appearing for the complainants, and Cecil H. Smith, *Esq.*, and Wm. R. Abernathy, *Esq.*, appearing for the defendants, English, Finley, Robinson, Foster and District No. 67 and arguing in behalf of said defendants the several demurrers, and the court having heard the argument of counsel, doth take the same under advisement to consider of the said demurrers and the authorities presented, and now, on this June 1st, A. D., 1916, the court being fully advised in the premises, announces his judgment upon the matters submitted as follows:

Upon the demurrer that there is a misjoinder of causes of action, the court doth sustain said demurrer of

the defendants to the bill herein, to which ruling and judgment each complainant asks, and is allowed an exception.

Upon the demurrer of the said defendants to the bill upon the ground that there is a misjoinder of parties defendant, the said demurrer is sustained in its entirety, to which ruling each complainant asks, and is allowed an exception.

Upon the demurrer to the bill upon the ground that therein is not shown a diversity of citizenship, the demurrer is sustained, to which ruling each complainant asks and is allowed an exception.

And upon the general demurrer upon the ground that this court is without power and jurisdiction to hear and determine the causes of action pleaded in said bill and its exhibits, but that under the constitution and laws of the State of Texas, the exclusive original jurisdiction of the matters pleaded in the bills of complainants is entrusted to the County Court of Collin County, Texas, in probate, and to none other, and that by reason thereof this Federal Court has not jurisdiction to entertain said action and determine the controversies pleaded herein, the demurrer is sustained, to which ruling each complainant asks and is allowed an exception.

And thereupon each complainant, by his counsel, announces that he does not desire to plead further, but elects to stand upon his bill and exhibits and the record herein now made in that behalf.

It is thereupon considered, ordered, adjudged and decreed by the court now here that the bill and action of the complainants is dismissed, and that the defendants and each of them go hence without day and recover herein their costs." (Rec. 74-5.)

After the judgment of dismissal was entered the court, at the request of plaintiffs, made the following:

Certificate of Court of Reasons for Dismissal.

"In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no federal question was involved, and that the bill and its exhibits, in my opinion, disclosed the infraction of no right arising under or out of the federal laws or Constitution; but that under the Constitution and laws of the State of Texas, the sole court of original jurisdiction of the matters therein sought to be pleaded is the County Court of Collin County, Texas. By reason whereof, this court might not have jurisdiction or power to entertain the bills of complainants: And that treating the demurrer as presenting this question of jurisdiction, and acting also independently of the demurrer, and on the court's own motion, the suit is dismissed only for the reasons above stated; that is, that the controversy, not arising under the laws and constitution of the United States, there is consequently no jurisdiction of the District Court of the United States.

And also on the ground that the record does not show that the controversy involved is one, in my opinion,

between citizens of different states, but that it appears from the record that some of the defendants who should be considered as plaintiffs and the remainder of the defendants are in fact citizens of the same state, and no other ground of jurisdiction appears from the record. The case is dismissed only for the reasons above stated, that is, that the controversy is not between citizens of different states, and consequently the Circuit Court of the United States has no jurisdiction: And for the reason assigned in the previous paragraph.

This certificate is made conformably to Act of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate, this the 1st day of June, A. D., 1916." (Rec. 75-6.)

Thereafter, plaintiffs on November 6, 1916, filed the following:

ASSIGNMENT OF ERRORS.

"Each complainant in this action, in connection with his petition for appeal, makes the following assignments of errors, which he avers exists:

I.

The court erred in sustaining the demurrer of the defendants to the complainants' bill and exhibits on the ground of want of jurisdiction over the cause of action pleaded therein.

II.

The court erred in sustaining the demurrer of the defendants on the ground that there was lacking a diversity of citizenship.

III.

The court erred in sustaining the demurrer of defendants on the ground of misjoinder of causes of action.

IV.

The court erred in sustaining the demurrer of defendants on the ground of misjoinder of parties.

V.

The court erred in dismissing complainants' bill.

VI.

The court erred in conceiving that no federal question was involved.

VII.

The court erred in conceiving that it was without jurisdiction or power to entertain the suit.

VIII.

The court erred in dismissing the suit of its own motion.

IX.

The court erred in conceiving that under Article V of the Constitution of the State of Texas, and Section VIII thereof, and Articles 1705 and 1706 of the Statutes of the State of Texas describing the jurisdiction of District Courts, that the suit of the complainants herein was

not within the jurisdiction of this court, and was only within the exclusive jurisdiction of the County Court of Collin County, Texas, in probate; and that this was not a court of general jurisdiction of the State of Texas.

Wherefore, the District Court of the United States within and for Sherman Division, the Eastern District of Texas, wherein is situate Collin County, Texas, was without jurisdiction or power to entertain the suit. Wherefore the complainants pray that said judgment be reversed" (Rec. 76-7).

Following the foregoing assignment of errors, plaintiffs presented their petition and bond for an appeal to bring this cause to the Supreme Court of the United States for review, and on November 6, 1916, said appeal was granted by Honorable Gordon Russell, District Judge, before whom the case was tried, and the bond approved and record was filed in this court (Rec. 78-84).

Statutes Involved.

Provisions of the Texas Constitution and Statutes as to courts and their jurisdiction:

Art. V, Section 1, Texas Constitution:

"The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioner's Courts, in courts of justices of the peace, and in such other courts as may be provided by law."

Art. V, Section 8, Texas Constitution:

"The district court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and *certiorari* and all writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters, over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The district court shall have appellate jurisdiction and general supervisory control over the county commissioner's court with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by

law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law."

ART. V, Section 16, Texas Constitution:

"The County Court shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice's court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed \$200.00, and they shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value \$200.00, and not exceed \$500, exclusive of interest, and concurrent jurisdiction with the district court when the matter in controversy shall exceed \$500.00, and not exceed \$1000, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases civil and criminal of which justices' courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed \$20, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from justices' courts there shall be a trial *de novo* in the county court, and appeals may be prosecuted from the final judgment rendered in such cases by the county court, as well as all cases civil and criminal of which the county court has exclusive or concurrent or original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.

The County Court shall have the general jurisdiction of a probate court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis* and common drunkards, grant letters testamentary and of administration,

settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons *non compos mentis* and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; and the county court, or judge thereof, shall have power to issue writs of injunction, mandamus and all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of the county court, or any other court or tribunal inferior to said court."

Art. 1706, Revised Statutes of Texas:

"The district court shall also have appellate jurisdiction and general control in probate matters over the county court established in each county for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians and minors as is, or may be, provided by law. Such court shall also have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever, for which a remedy or jurisdiction is not provided by law or the constitution, and such other jurisdiction, original and appellate, as may be provided by law."

Art. 3206, Revised Statutes of Texas:

"The county court shall have the general jurisdiction of a probate court. It shall probate wills,

grant letters testamentary or of administration, settle the accounts of executors and administrators, and transact all business appertaining to the estates of deceased persons, including the settlement, partition and distribution of such estates."

Art. 3207, Revised Statutes of Texas:

"The district court shall have appellate jurisdiction and general control in probate matters over the county court establishing in each county for the probating of wills, granting letters testamentary or of administration, settling the accounts of executors and administrators, and for the transaction of business appertaining to estates, and original jurisdiction and general control over executors and administrators under such regulations as may be prescribed by law."

Art. 3358, Revised Statutes of Texas:

"When a will has been probated, its provisions and directions shall be executed, unless the same are annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate."

Art. 3359, Revised Statutes of Texas:

"Such proceeding shall be by application in writing, filed with the clerk of the court, setting forth the provisions and directions in the will that are objected to, and the grounds of objection."

Art. 3360, Revised Statutes of Texas:

"Upon the filing of such application, the clerk shall issue a citation for the executor or administrator with the will annexed to appear at a regular term of such court and answer such application, the substance of which application shall be set forth in the citation; and such citation shall further direct

such executor or administrator to refrain from executing the provisions and directions in the will that are objected to, until such application has been heard and decided by the court "

Art. 3361, Revised Statutes of Texas :

"If it appear upon the hearing of such application that no material injury to the interests of the applicant will be occasioned by executing the provisions and directions of the will, and that such provisions and directions are legal, the objections shall be overruled, and the provisions and directions objected to shall be confirmed and executed, and an order to that effect shall be entered upon the minutes; otherwise an order shall be entered upon the minutes of the court annulling the provisions and directions in the will to which objections are sustained, or suspending the execution of the same until the further order of the court."

Art. 5699, Revised Statutes of Texas :

"Any person interested in any will which shall have been probated under the laws of this state, may institute suit in the proper court to contest the validity thereof, within four years after such will shall have been admitted to probate, and not afterward."

Election and qualification of special judge :

Art. V, Section II, Texas Constitution :

"* * * When a judge of the district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. * * *"

BRIEF OF ARGUMENT ON HEARING ON SUMMARY DOCKET.

Short Statement.

Succinctly stated, appellants brought this suit to recover real and personal property located in Collin County, Texas, of the alleged value of one hundred and sixty-four thousand dollars (\$164,000), and for partition. It appears from the pleadings and the exhibits thereto that Moses and Mary Jane Hubbard, while living together as husband and wife, in Collin County, Texas, acquired said property, and that the same was the community property of said Moses and Mary Jane Hubbard. On May 26, 1906, Moses Hubbard died, a daughter named Alla had been born to Moses and Mary Jane Hubbard, but she died without issue before her father, so that at his death Moses Hubbard left no descendants. Prior to his death, and on January 5, 1897, Moses Hubbard and his wife executed a joint will devising their entire estate to the appellees, except R. L. Clayton and Cora D. Spencer, in trust. By the terms of the will, at the death of Moses Hubbard, the Trustees were to take charge of the estate, manage same and apply one-half of the net revenues arising therefrom to maintaining the school in District 67 in Collin County, Texas, known as the Alla School, and pay the other half of the net revenues to the surviving wife so long as she lived, and at her death apply all

the revenues arising from said trust estate to the maintenance of said Alla School. On July 31, 1906, the joint will of Moses Hubbard and wife was probated by a judgment of the County Court of Collin County. At the death of Moses Hubbard said Trustees took charge of the trust estate, managed same, applied half of the revenues to Alla School and paid the other half to Mary Jane Hubbard until her death, on February 17, 1914, and since said time and now possess and manage said estate and claim to pay revenues arising therefrom to the maintenance of said Alla School.

After the probating of the will of Moses and Mary Jane Hubbard, and prior to the death of Mary Jane Hubbard, and on January 11, 1913, appellee Trustees filed in the District Court of Collin County a suit against Texas Christian University and Mary Jane Hubbard, alleging that the defendants in that suit were setting up a claim to the trust estate in their hands, and asking that their title be quieted. On February 22, 1913, a judgment was rendered in said cause for said Trustees as against the Texas Christian University, vesting all the interest of Mary Jane Hubbard in the trust estate in said Trustees, subject alone to the right of Mary Jane Hubbard to receive half the revenues arising therefrom during the rest of her life.

At the death of Mary Jane Hubbard, she left a separate estate acquired after the death of her husband, of the alleged value of eighteen thousand (\$18,000.00) dollars, and a will dated February 5, 1914, disposing of same.

Said will, after making a number of specific bequests to relatives and friends, in clause twelve, devises her jewelry and the remainder of her estate to appellee, Cora D. Spencer, and names appellee, R. L. Clayton, as executor of said will.

The said will of Mary Jane Hubbard was probated by the judgment of the County Court of Collin County on May 14, 1914, and the estate was taken charge of by R. L. Clayton, as executor.

Appellants, by their complaint herein, seek to contest and set aside as invalid the joint will of Moses and Mary Jane Hubbard and the judgment of the County Court of Collin County probating the same; to contest and set aside as invalid the judgment of the District Court of Collin County, wherein the interest in the trust estate of Mary Jane Hubbard is vested in appellee Trustees; to contest and set aside as invalid section twelve of the will of Mary Jane Hubbard and the judgment of the County Court of Collin County probating same insofar as said section might be held to devise the trust or community estate to appellee, Cora D. Spencer; then asserting that the trust estate was the community estate of Moses and Mary Jane Hubbard, that at the death of Moses Hubbard without children, Mary Jane Hubbard inherited all, and at the death of Mary Jane Hubbard without children, the appellants and appellee, Cora D. Spencer, as next kin to Mary Jane Hubbard, inherited the trust estate, and asking partition of same. Motion to dismiss the complaint for want of jurisdiction was sustained, and a direct appeal prosecuted to this court.

I.

The complaint assails the validity of a will and its probate, and presents matters of pure probate; in the absence of a law in Texas where the will was probated, giving the right in a suit **INTER PARTES** to assail the probate of wills, the Federal District Court is without jurisdiction of same.

At the foundation, in order for appellants to recover in this cause, it is necessary to set aside the joint will of Moses and Mary Jane Hubbard and the judgment of the County Court of Collin County probating the same. True, the judgment of the District Court of Collin County, vesting the interest of Mary Jane Hubbard in appellee Trustees, and the residuary clause in the will of Mary Jane Hubbard vesting her undeviseed estate in Cora D. Spencer, and the judgment probating that will, are obstacles that lie between appellants and the coveted goal, still the annulling of the before mentioned joint will is a matter of first importance which is sought to be accomplished by the complaint.

In *O'Callaghan v. O'Brien*, 199 U. S. 110, this court, after reviewing at some length the authorities on the proposition here presented, announced the following propositions:

1. That, as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

2. That where a state law, statutory or customary gives to the citizens of the state, in an action or suit *inter partes*, the right to question at law the probate of a will, or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states, or aliens, will enforce such remedies.

To the same effect, *Waterman v. Canal—Louisiana Bank & T. Co.*, 215 U. S. 44; *Broderick's Will*, 21 Wall. 503; *Steed v. Curtis*, 191 Fed. 534.

The laws of Texas do not confer the right to bring suit **INTER PARTES** to nullify the probate of a will, but such proceeding is made an ancillary probate proceeding.

Art. V, Section 16, of the Constitution of Texas, provides that the County Courts shall have the general jurisdiction of probate courts; they shall probate wills. Art. 3206, Revised Statutes of Texas carries out this mandate of the Constitution, and makes a similar provision. Art. V, Section 8, of the Constitution of Texas provides that the ~~County~~^{District} Courts shall have the ~~general~~^{appellate} jurisdiction and general control in probate matters over the County Court established in each county for appointing guardians, granting letters testamentary and of administration, and of probating wills. Arts. 1706 and 3207, Revised Statutes of Texas, carry out this mandate of the Constitution.

The provisions of the Texas statutes directly applicable are the following:

Art. 3358: "When a will has been probated, its provisions and directions shall be executed, unless the same are annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate."

Art. 3359: "Such proceeding shall be by application in writing, filed with the clerk of the court, setting forth the provisions and directions in the will that are objected to, and the grounds of objection."

Art. 3360: "Upon the filing of such application, the clerk shall issue a citation for the executor or administrator with the will annexed to appear at a regular term of such court and answer such application, the substance of which application shall be set forth in the citation; and such citation shall further direct such executor or administrator to refrain from executing the provisions and directions in the will that are objected to, until such application has been heard and decided by the court."

Art. 3361: "If it appear upon the hearing of such application that no material injury to the interests of the applicant will be occasioned by executing the provisions and directions of the will, and that such provisions and directions are legal, the objections shall be overruled, and the provisions and directions objected to shall be confirmed and executed, and an order to that effect shall be entered upon the minutes; otherwise an order shall be entered upon the minutes of the court annulling the provisions and directions in the will to which objections are sustained, or suspending the execution of the same until the further order of the court."

Construing the foregoing provisions of the Texas Constitution and laws, the courts of Texas have held that a proceeding to set aside a will and the judgment pro-

bating it must be filed in the probate court that rendered the judgment of probate.

Franks v. Chapman, 60 Tex. 46.

Franks v. Chapman, 61 Tex. 579.

Heath v. Layne, 62 Tex. 86.

Fisher v. Wood, 65 Tex. 204.

Dew v. Dew, 57 S. W. 926.

Hilgers v. Hilgers, 159 S. W. 853.

It is, perhaps, pertinent here to remark that the foregoing has been the rule in Texas since the adoption of the present Constitution in 1879. Prior to that time a different rule prevailed.

So much of appellants' complaint as seeks to set aside section twelve of the will of Mary Jane Hubbard and the probate of same, insofar as it applies to the trust estate sought to be recovered, is in the same situation as the parts seeking to set aside the joint will herein discussed. For the same reasons there is lack of jurisdiction as to that.

II.

The courts will align the parties to suits according to interest, then if diversity of citizenship does not exist, the cause will be dismissed for want of federal jurisdiction.

The complaint shows that Mary Jane Hubbard died without children or husband; that her heirs and next of kin are two brothers and a sister, Albert E. Sutton, DeLana M. Sutton and Rachael Kirtley, and the heirs of a

deceased brother, Lewis Sutton. Lewis Sutton had five children, Cora D. Spencer, Elizabeth E. Davis, Ida Krickbaum, Geo. D. Sutton, and Lewis Sutton, Jr., Lewis Sutton, Jr., died without children and left as heirs his brothers and sisters and mother Helen M. Marshall. That is, the heirs of Mary Jane Hubbard are her sister and two brothers, and the widow and children of a deceased brother, Lewis. All of these parties named are appellants, and were plaintiffs below, and have their domiciles in states other than Texas, except appellee, Cora D. Spencer, who was a defendant below, and who, at the time the suit was instituted, had a domicile in Texas. The appellee Trustees and the appellee Clayton resided in Texas. It is our insistence that the interest of Cora D. Spencer in the recovery and partition of the trust estate is identical with that of appellants, and for that reason, diversity of citizenship does not exist in this cause.

In *Helm v. Zarecor*, 222 U. S. 356, it is said:

"It was undoubtedly the duty of the court, in determining whether there was the requisite diversity of citizenship, to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill."

Such seems to be the clear mandate of Section 37 of the Judicial Code. *Gilbert v. Davis*, 235 U. S. 565.

Cora D. Spencer was a necessary and indispensable party to the cause. *Barney v. Baltimore*, 6 Wall. 280.

After the necessary parties are aligned according to interest, unless there is diversity of citizenship as to

each party on each side of the controversy, then federal jurisdiction does not exist.

Anderson v. Watt, 138 U. S. 694.

Rich v. Bray, 37 Fed. 273.

Barney v. Baltimore, 6 Wal. 280.

Bland v. Freeman, 29 Fed. 669.

Cilley v. Patten, 62 Fed. 498.

While we insist that the setting aside of the joint will of Moses and Mary Jane Hubbard and its probate is a proposition that lies at the base of any right of appellants to recover, and that there is no federal jurisdiction as to that matter, both on the ground that it is a matter of pure probate, and that diversity of citizenship is lacking, and that the lack of jurisdiction as to this proposition is decisive of the controversy; still it may be contended that there are other propositions involved in the complaint that occupy a different attitude.

The complaint does seek to set aside section twelve of the will of Mary Jane Hubbard and its probate insofar as the same affects the trust estate, and it may be contended that inasmuch as Cora D. Spencer is the residuary legatee of Mary Jane Hubbard, that the interests of appellants and Cora D. Spencer are adverse, and that the proposition that there is lack of diversity of citizenship will be denied.

The construction of the residuary clause in Mary Jane Hubbard's will and the determination of the proposition of whether, the joint will being invalid, the trust estate would pass to Cora D. Spencer, depends upon the intention of the testatrix in making the residuary clause.

She and her husband had bequeathed the trust estate to appellee trustees. For nearly eight years after the death of her husband she accepted half the revenues arising from the trust estate, under the will that bequeathed the estate to appellee trustees. On February 22, 1913, she filed a disclaimer as to any interest in the trust estate, except the right to collect half the revenues arising from same for life. On February 5, 1914, she made the will containing the residuary clause, as follows:

"I give and bequeath all the residue of my property that has not been bequeathed, including my jewelry, to my loving niece, Cora D. Spencer, to have and to hold to her in fee simple forever."

We respectfully submit that the residuary clause, the joint will aside, does not pass the trust estate to Cora D. Spencer, but only attempts to dispose of her separate estate acquired after the death of her husband, and that said residuary clause is not a matter actually involved in the recovery of the property by appellants. At all events, this proposition of the complaint is clearly vulnerable to the objection that it presents a matter of pure probate.

That phase of the complaint that seeks to set aside the judgment of the District Court of Collin County, vesting the interest of Mary Jane Hubbard in appellee trustees, rendered after the probate of the joint will, while not affecting a probate matter, is vulnerable to the objection that diversity of citizenship is lacking.

For the foregoing reasons we assert that in the complaint of appellants, and every phase of it, federal jurisdiction is lacking; that the judgment of the District Court dismissing it was right, and that said judgment ought to be affirmed.

Respectfully submitted,

WM. R. ABERNATHY,

GEO. R. SMITH,

CHAS. BATSELL,

HEAD, DILLARD, SMITH, MAXEY & HEAD,

Attorneys for Appellees.

Cecil H. Smith

Of Counsel.



DEC 29 1914

JAMES B. MAHER

CLERK

NO. **7** **330**

**In the Supreme Court of the United States
of America**

**ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL
E. KIRTLEY, ELIZABETH E. DAVIS, GEORGE D.
SUTTON, IDA KRICKBAUM, HELEN MARSHALL,**
Complainants

v

**JOHN H. C. L. ENGLISH, and F. S. FINLEY, and J. T.
ROBINSON, and W. E. FOSTER, Superintendent of
Public Instruction of Collin County, Texas, and District
Trustees of District Number 67, in the County of Collin
and State of Texas, and ROBERT L. CLAYTON, and
CORA D. SPENCER,**

Defendants

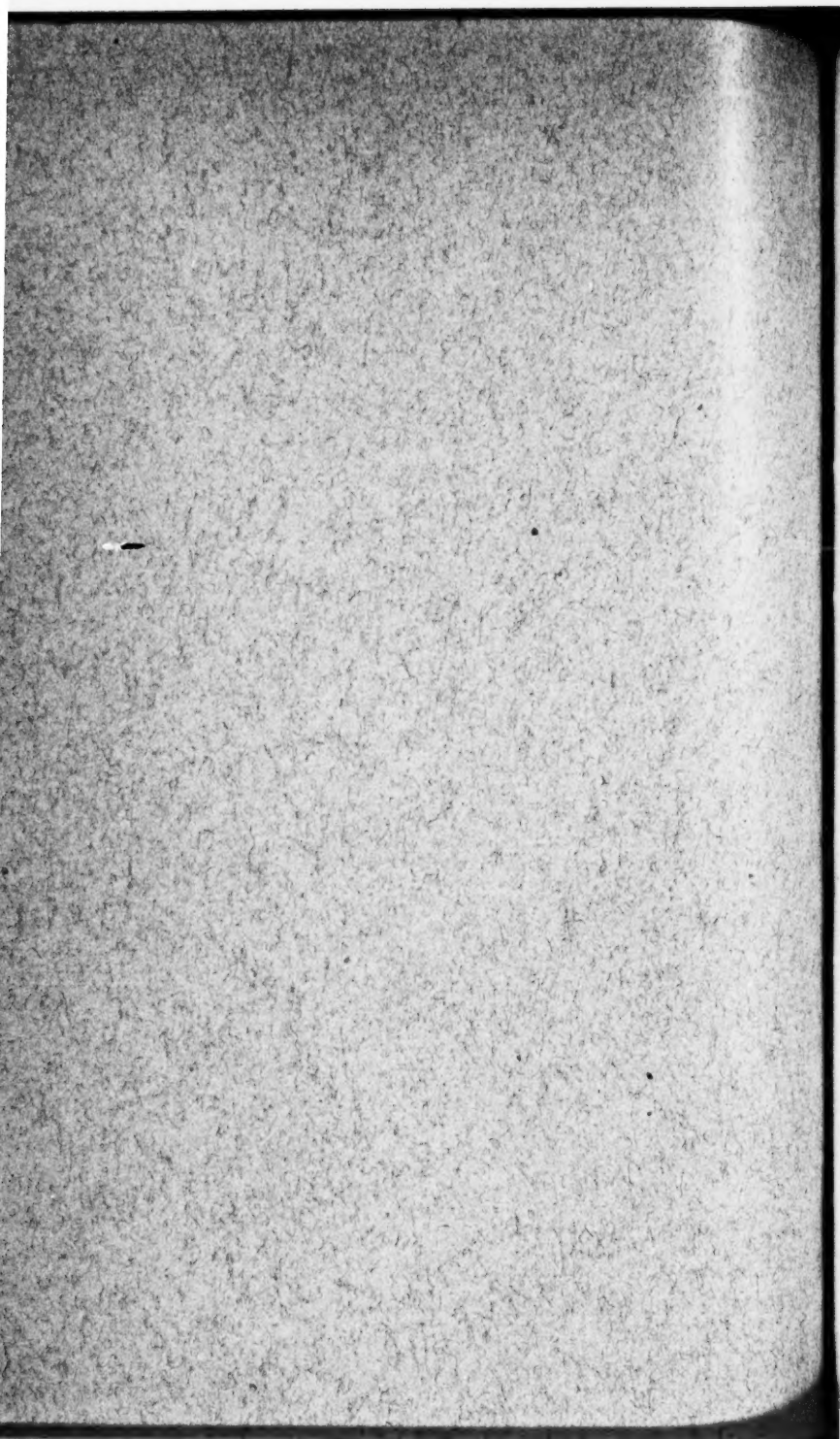
**Appeal from the United States District Court, for Eastern
District of Texas.**

The Hon. Gordon Russell, United States District Judge, Presiding

ALLEN, G. FISHER, Chadron, Nebraska
Solicitor for each Complainant.

**CECIL H. SMITH, Sherman, Texas,
WILLIAM R. ABERNATHY, McKinley, Texas,
MESSRS FREEMAN & BASTELL,
Sherman, Texas,**
Solicitors for Defendants.

**Brief of Appellant, on Merits and Motion to
Dismiss or Affirm**



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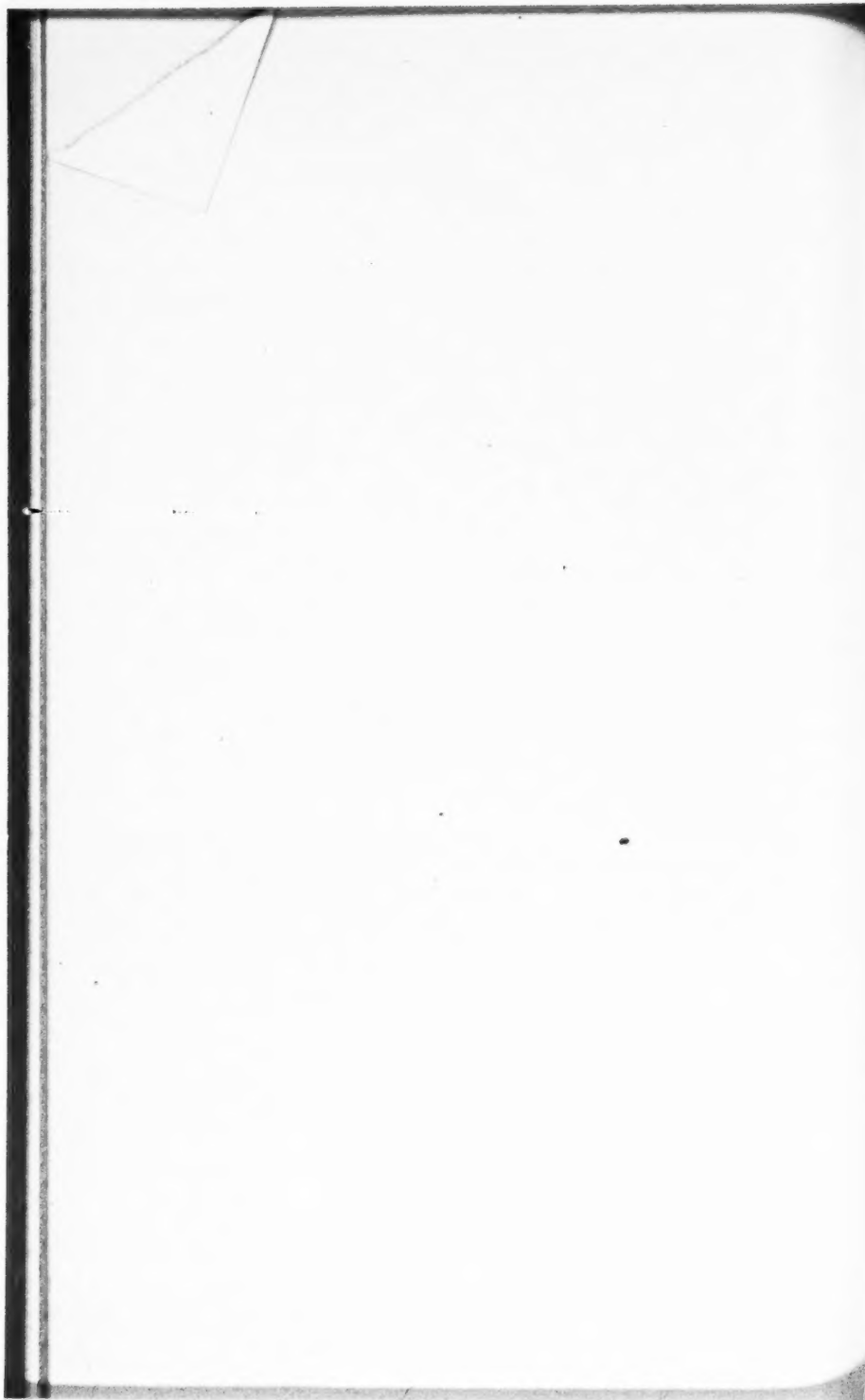
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STATEMENT OF CASE

These are several appeals by the several complainants against all defendants, and concern the jurisdiction of the trial court over a bill in equity by all the complainants against all the defendants, as defendants to determine rights of heirs-at-law to certain real estate described, and for possession of personal property described, and for an accounting against certain of the defendants claiming as testamentary trustees and independent executors of the property in controversy, and quia timet against the District which claims now to be the beneficiary of this trust, and against Spencer who might claim as co-tenant in common for a certain share in that property, with complainants, but who has disclaimed any interest, and is estopped to make any claim, and Clayton executor of the common source of title, but whose will did not dispose of this property in controversy, which is intestate property, as it is claimed. The property in controversy is alleged to be of the value of one hundred sixty thousand dollars, and the interest of each of complainants is stated to be more than eight thousand dollars, the proportions being different.

The answers of defendants to interrogatories stated the value of personalty and realty to be various amounts, and with rents received, and for which accounting is demanded amounts to \$124,899.52; so that each complainant having the very smallest demand is claiming not less than \$7300.00 for himself.

Defendants Trustees claim under a trust sought to be created by the will of Moses Hubbard exhibited to complainants' bill, as trustees for school most nearly represented by the school of Trustees of District 67.

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But the exhibits show this property thus claimed as trust property was all community property, of Moses and Mary Jane Hubbard, and none his separate property; this community had no child or descendants surviving at death of Moses; hence the community passed to Mary Jane. The exhibits show that her executor Clayton, and her residuary legatee Spencer did not claim any of this community property under her will, but acquiesced in the claim of these trustees, and estopped themselves to claim any share or interest in this community property, altho' Mary Jane Hubbard claimed it for herself by her deed and acts.

The exhibit contains a certificate from the clerk of Probate court of Collin county, showing, in effect, that the probate of Mary Jane Hubbard estate is yet open. But this certificate was a mistaken one, and the administration was closed and Clayton, executor discharged in the Fall of 1915 pending this suit, and after he was subpoenaed herein, although this was not pleaded by Clayton.

The purported will of Moses Hubbard, had been signed by Mary Jane Hubbard also, but was never probated after her death, as her will. Nor was it valid as his will for there was no separate property inventoried of his.

It was also sought, in the bill of complainants, to set aside these supposed wills as muniments of title, if any defendant claimed them to be such as against complainants, who are the brothers and sisters and daughters and son and widow of another deceased brother of Mary Jane Hubbard, the survivor of the community of Moses Hubbard and Mary Jane Hubbard, husband and wife, childless.

The points involved in this appeal, were several motions, argued and sustained by the lower court as demur-

rers, involving the jurisdiction of that Federal Court to try the issues tendered, which were sought to be raised by complainants' bills as several actions to quiet title, and by the adroit answers, which claimed the sole jurisdiction lay in the county court, in Probate, of Collin County, and State of Texas; and also, that defendant Spencer, was co-tenant in common with complainants, and she was citizen of Texas, as were the defendants, Trustees also; that she should be arranged with complainants, who are all citizens of other states, and not of Texas; and that by such arrangement there was not a diversity of citizenship between all claimants on each side.

The district court having heard counsel fully made a certificate to this court, that the controversy was not entirely between citizens of Texas on one side, and citizens of other states and a citizen of Texas on the other side: and also, that the bill and exhibits showed the infraction of no right arising under the federal laws or Constitution; but that under the laws of state of Texas, the sole court having jurisdiction originally of the controversy was the county court of Collin County, Texas.

(Printed Record, page).

ASSIGNMENTS OF ERROR

These complainants as several and separate petitioners for appeal each assigned as errors that the lower court erred in sustaining each demurrer on each ground; id est; there was error in holding that the citizenship was not diverse between adversary parties; there was error in holding there was mis joinder of parties; there was error in holding that there was mis joinder of causes of action; there was error in conceivin that no federal question was involved; there was error in holding that the local probate

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court had exclusive jurisdiction, and the Federal court had none.

(Printed Record, page).

BRIEF

In any aspect of this bill, there was original jurisdiction in the Federal court.

(a). No claim by defendants that the probate court would not have jurisdiction, to give equitable relief and hear an equitable petition, and receive equitable defenses, to try the validity of either will or the probate of it, is advanced.

Article 5, section 16 of the Constitution gives the county court its jurisdiction. infra page.....)

Article 3206 of statute defines the probate jurisdiction of the courts and fixed it in the county court. (Infra page.....).

Article 1771, of statute gives the county court full equity powers, as follows, viz; the county court is authorized to hear and determine any cause, cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them.

Article 3221 forbids a jury trial in probate matters.

By articles 1763 and 1764, the county court is given equality of jurisdiction with district courts in civil actions, and concurrent somewhere, and exclusive as to some civil causes.

Now, the nature of the suit here is not such a one as is described in O'Callaghan v O'Brien 199 U. S. at page 114,

It is drafted in a manner after *Gaines v Fuentes*' reasoning and seeks only to effect a judgment of the court to the point that this community property, is, and was considered by the devisees and executor of Mary Jane Hubbard, as intestate property, and to quiet the title of each complainant in his proportionate share of such property as an heir-at-law of Mary Jane Hubbard; and for an accounting by the trustees who were in fact, executors de son tort, although claiming to be independent executors and trustees, freed by the lapse of time, and the order of the probate court from the jurisdiction of that probate court, which had assumed in 1906 to establish his will as muniment of title, effectual only on his separate property, whereof none was ever inventoried.

Therefore, as the county court of Collin county was a court of general jurisdiction, with plenary power to give equitable relief, it must follow in view of the situation of all these parties that the district court of the United States had jurisdiction.

(b) This being, in its essence a bill quia timet, and remove cloud from the several titles of the joining complainants, which is a suit whereof the statute of Texas gives jurisdiction in this case to its courts of equitable jurisdiction, and the defendant Spencer disclaiming any interest through the sources of title whereunder these claim, and answering to the merits of their pleaded title, there can be no doubt of the power of courts of this Nation to try and determine the matters in issue herein.

The case of *Japhet v Pullen* decided by Court of Civil Appeals of Texas, 133 South Western Reporter 331, became final, through the denial of writ of error by the supreme court of that state.

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In the opinion are found "conclusions of law.
It holds:

Under Const., art. 5, sec. 8, and Rev. Stat. 1895 arts. 1099, 1841, prescribing the jurisdiction of district courts a suit by heirs against an independent executrix to recover property, both real and personal, alleged to be of the estate of the testator and withheld from the assets of the estate under the claim that it belonged to her and her codefendants, was not within the exclusive jurisdiction of the county court, but was within the jurisdiction of the district court, to determine in whom was the equitable title to the property was, and to decree a partition thereof, as well as the other property of the estate, among the owners.

Where a widow, administering the estate of her deceased husband not as the survivor of a community, but as independent executrix under his will, caused a whole sale liquor business belonging to the estate to be incorporated, it was proper in a suit by heirs against her to recover property, both real and personal, alleged to have been withheld from the assets of the estate, to adjudge to the heirs their share of the capital stock in the corporation.

It is claimed by the first assignment that the court erred in overruling defendant's pleas and exceptions to the jurisdiction of the court, for the reason that plaintiff's petition shows upon its face that the county court of Harris county had exclusive jurisdiction of the case. We overrule the assignment, because the suit being against an independent executrix for the recovery of property, both real and personal, alleged to be of the estate of her testator and withheld from the assets of the estate under the claim that it belonged to her and her co-defendants, it was within the jurisdiction of the district court to determine in whom the equitable title to such property was, and to decree a partition thereof, as well as the other property of the estate among the owners.

Art. 5, sec. 8, Const. articles 1099, 1841, (which are quoted above as articles 1706, 3207 of Civ. Stat. 1914) *Bente v Sullivan* 115 SW. 354; *Wiseman v Swain* 114 SW. 148 (through a writ of error was granted in the last named case, the disposition made of it shows that the district court had jurisdiction,) 124 SW. 621. *Fidelity & Deposit Co. v Texas Land & Mortgage Co.* 40 Texas Civ. App. 489; *Arnold v Hodge* 20 Tex. Civ. App. 211; *Cox v Cox*, 77 Tex. 589. *Wadsworth v Chick* 55 Tex. 241; *White v White*, 11 Tex. Civ. App. 113; *Phillips v Phillips* 23 Tex. Civ. App. 532; *Miers v Betterton*, 18 Tex. Civ. App. 430."

In *Fisher v Wood*, 65 Tex. at page 199, the supreme court of Texas has held, in 1885;

"Where, however, at a sale of property under a decree of the probate court, the executor and another had fraudulently combined together to deprive of their rights the persons interested in the estate of a deceased person, a court of equity will charge the property in their hands with a trust, and will constitute them trustees for these entitled to the estate. To do so, it would not be necessary to set aside the decrees of the probate court ordering and confirming the sale.

The district courts of this state, in the exercise of their original jurisdiction and general control over executors, administrators, etc., and of their equity powers, under the constitution, while they leave the legal title standing as directed to be made under the orders of the probate court, will, upon a proper averment and proof, affect the fraudulent purchaser with a trust and compel him to hold the property as trustee for those entitled to it; and it matters not whether the fraud which calls the equity power of the court into operation occurred in procuring the orders in probate through which the sale was directed to be made or in the sale itself, or in the making of deeds in violation of the order of confirmation.

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The district courts of this state, in the exercise of their equity powers have the authority, where the rights of bona fide purchasers have not intervened, to cancel a conveyance made by an executor in violation of the order of the probate court confirming a sale of land, when necessary for the protection of devisee heirs or creditors of an estate, and they have this authority, notwithstanding a similar power may exist in the probate court."

In Walker v Howard 34 Texas at page 478 is held:

"Trespass to try title may be maintained in the courts of this state upon a merely equitable title.

The legal rights of a surviving husband in community real estate could not be divested by the last will and testament of his wife and it is not clear that an administration upon the estate of a deceased wife could affect her surviving husband's power over her portion of the community property."

In Wall v Clark 19 Texas at page 321 is held:

"On the death of the wife without children, the community property belongs to the surviving husband and neither the county court nor the administrator of the wife can exercise any control over it."

(c). "It is a suit to enforce the trust impressed upon the estate whereof Mary Jane Hubbard died seized. It is a suit to undo the fraud perpetrated by English. It is a suit to remove the cloud which has been imposed upon the title to the real estate and personalty, which comprised her property coming to her through the community of her husband and herself upon his death, and upon her death to these heirs-at-law and of which English and his associates claim as trustees for Mary Jane Hubbard and defendants District Trustees by a void will.

"The enforcement of trusts, the undoing of frauds, the removal of void instruments, and the rec-

ord of them from the title to real estate which they cloud are well known heads of equity jurisprudence.

"It has every essential attribute of, and it is, a suit in equity."

This is an adaption of the language of Judge Sanborn's dissent in *Wahl v Franz*, 100 Fed. Rep. 680 (C. C. A.)

Payne v Hook 7 Wall., 425, 430, 19 L. Ed. 260.

Ellis v Davis 109 U. S. 496, 27 L. ed. 1009, 1010.

Byers v McAuley 149 U. S. 608, 37 L. ed. 867.

Gaines v Fuentes 92 U. S. 22.

Williams v Crabb 117 Fed. Rep. 193, (C. C. A.)

Certiorari denied 187 U. S. 645.

In *Waterman v Canal Louisiana Bank & T. Co.*, 215 U. S. at page 44 you have said:

"It is also true, as was held in the court below in the case at bar, that the prior possession of the state probate court cannot be interfered with, by the decree of the Federal court. Still, we think there is an aspect of this case within the Federal jurisdiction and for which relief may be granted to the complainant, if she makes out the allegations of her bill under the other prayers, and the prayer for general relief therein contained. Under such prayer, a court of equity will shape its decree according to the equity of the case." *Walden v Bodley* 14 Pet. 164 10 L. ed. 401.

You held therein: A Federal court of chancery has jurisdiction, where the proper diversity of citizenship exists, to determine the interest of the heir in an alleged lapsed legacy and the consequent increase in the residuary estate, although the bill also asks other relief which cannot be granted because it would interfere with the ordinary settlement of the estate in the state probate court.

Page Ten—

And as to equity jurisdiction you held rule 47 properly caused the lower court to try the cause among the parties present.

"The circuit court in this case construed the bill, in view of its broad prayer for relief, as one which undertook to take the entire settlement of the estate from the hands of the probate court, and denied the jurisdiction of the circuit court of the United States in the premises. * * * and while all that it asks cannot be granted, enough was stated in it to make a case within the jurisdiction of the Federal courts within the principles we have stated."

Now, in the instant case, the probate court lost and abjured any jurisdiction over the property which is sought in this suit through the fact that they became independent executors claiming to be trustee in the Spring of 1906. The defendant Clayton executor of Mary Jane Hubbard and the residuary legatee Spencer has each waived any claim of any interest in the property in suit, through the inventory which is exhibited here, their petition for, and acquiescence in probate of the property inventoried alone, and their disclaimer of any interest in the property in suit, or relief sought against it, in their separate answers herein.

"The case made upon the bill was within the original jurisdiction of the circuit court of the United States. The right of the circuit court to maintain such actions, notwithstanding the legislation of the state creating probate courts, has been so recently before this court, as to require no further consideration now."

Citing *Waterman* case *supra*, just quoted.

McClellan v Carland 217 U. S. 268.

2. There is no improper mis-joinder of causes of action. The 26th equity rule permits this joinder.

The Statutes of Texas require it. And the decisions of the court of last resort in that sovereignty approve it.

3. There is no improper mis-joinder of parties.

Equity rule 37 says: "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made defendant who has or claims an interest adverse to the plaintiff. * * ! Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant."

Equity Rule 41. "In suits to execute the trusts of a will, it shall not be necessary to make the heirs-at-law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him."

Miller v Texas & P. R'y Co., 132 U. S. 662

McArthur v Scott 113 U. S. 340.

This last rule is the declaration of this court that the case at bar may be maintained in Federal courts.

McArthur v Scott 113 U. S. 340.

Gormley v Clark 134 U. S. 338.

Respectfully submitted,

Allen G. Fisher
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Chadron, Nebr.

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CONSTITUTION OF TEXAS

(Art. 5 Section 8)

Sec. 8. The district court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the state to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors in-

volving official misconduct; of all suits to recover damages for slander or defamation of character; for all suits for trial of title to land and for the enforcement of leins thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration, when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive interest; of contested elections; and said court, and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari, and all writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators, and guardians, and for the transacting of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors, under such regulations as may be perscribed by law. The district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulation as may be perscribed by law; and shall have general original jurisdiction over all causes of action whatever for which remedy or jurisdiction is not provided by law or this constitution, and such other jurisdiction, original and appellate, as may be provided by law.

**VERNON'S SAYLES ANNOTATED CIVIL STATUTES
OF THE STATE OF TEXAS**

Article 1705. (1098) (1117) ORIGINAL JURISDICTION OF THE DISTRICT COURT. The district court shall have original jurisdiction in civil cases.

1. Of all suits in behalf of the state to recover penalties, forfeitures and escheats.

4. For all suits for the trial of title to land and for the enforcements of leins thereon.

6. Of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest.

Art. 1706. (1099) (1118) JUDISDICTION IN MATTERS OF PROBATE.

The district court shall also have appellate jurisdiction and general control in probate matters over the county court established in each county for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians and minors as is, or may be provided by law. Such court shall also have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be perscribed by law; and shall have general jurisdiction over all causes of action whatever, for which a remedy or jurisdiction is not provided by law or the constitution, and such other jurisdiction, original and appellate, as may be provided by law.

Art. 1712. (1106) (1122) TO HEAR AND DETERMINE ALL CASES OF LEGAL OR EQUITABLE COGNIZANCE.

Subject to the limitations stated in this chapter, the district court is authorized to hear and determine any cause which is, or may be, cognizable by courts, either of law or equity, and to grant any relief which could be by said courts, or either of them.

Art. 3207 (1841) (1790) PROBATE JURISDICTION OF DISTRICT COURT. The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each

county for the probating of wills, granting letters testamentary or of administration, and for the transaction of business appertaining to estates, and original jurisdiction and general control over executors and administrators under such regulations as may be prescribed by law.

Article 1763. **EXCLUSIVE ORIGINAL JURISDICTION.** The county court shall have exclusive original jurisdiction in civil cases when the matter in controversy shall exceed in value of two hundred dollars, and shall not exceed five hundred dollars.

Art. 1764. **CONCURRENT ORIGINAL JURISDICTION.** The county court shall have concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred and not exceed one thousand dollars, exclusive of interest.

Art. 1766. **JURISDICTION DENIED IN CERTAIN CASES.** The county court shall not have jurisdiction of any suit to recover damages for slander and defamation of character, **nor of suits for the recovery of lands, nor of suits for the enforcement of liens upon land,** nor of suits in behalf of the state for escheats, nor of suits for divorce, nor of suits for the forfeiture of the charters of incorporations and incorporated companies, **nor of suits for the trial of the right of property** levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed the value of five hundred dollars.

Art. 1771. **BOTH LAW AND EQUITY POWERS.** Subject to the limitation stated in this chapter, **the county court is authorized to hear and determine any cause,** which is, or may be, cognizable by courts, **either of law or equity,** and to grant any relief which could be granted by said courts, or either of them.

Art. 1772. To grant remedial writs.

Art. 1783. Probate day to be designated. On the first day of the term for civil business, the county court shall, by an order entered on the minutes designate a day for taking up the probate business; and the probate docket shall thereupon be called in its regular order, unless otherwise ordered by the court.

Article 3206. **Probate jurisdiction of the county court.** The county court shall have the general jurisdiction of a probate court. It shall probate wills, grant letters testamentary or of administration, settle the accounts of executors and administrators, and transact all business appertaining to the estates of deceased persons, including the settlement, partition and distribution of such estates.

Art. 3221. **No trial by jury in probate matters.** There shall be no trial by jury in probate matters, except where expressly provided by law.

Art. 1766. (1157) (1164) **JURISDICTION DENIED IN CERTAIN CASES.** The county court shall not have jurisdiction of any suit to recover damages for slander or defamation of character, nor of suits for the recovery of lands, nor of suits for the enforcement of liens upon land, nor of suits in behalf of the state escheats, nor of suits for divorce nor of suits for the forfeiture of the charters of incorporations and incorporated companies, nor of suits for the trial of the right to property levied on by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars.

Art. 7731 (5231) **METHOD OF TRYING TITLES TO LAND ETC.** All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to lands, tenements or other real property shall be by action of trespass to try title.

7. It shall conclude with a prayer for the relief sought.

Art. 7737 (5254) THE POSSESSOR SHALL BE DEFENDANT. The defendant in the action shall be the person in possession, if the premises are occupied, or some person claiming title thereto in case they are unoccupied.

Art. 7738 (5255) MAY JOIN AS DEFENDANTS WHOM. * The plaintiff may join as defendant with the person in possession, any other person who, as landlord, remainderman, reversioner, or otherwise; may claim title to the premises, or any part thereof, adversely to the plaintiff.

Art. 7741 (5258) ANSWER TAKEN AS ADMITTING POSSESSION.

Such plea or any other answer to the merits shall be an admission by the defendant, for the purpose of action, that he was in possession of the premises sued for, or that he claimed title thereof at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only...

Art. 7754, (5271) MAY RECOVER A PART, ETC. WHEN. When there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against one or more of the defendants the premises, or any part thereof, or any interest therein, or damages according, to the rights of the parties.

Art. 2172. (1504a) ACTIONS MAINTAINABLE AGAINST NON-RESIDENTS.

An action may be brought and prosecuted to final decree, judgment, or order, by any person claiming a right or interest in or to any property in this state, against any person or persons who are non-residents of this state, or whose place of residence is unknown, or who are transient persons, who claim an adverse estate, or interest in, or who claim any lien or incumbrance on said property for the purpose of determining such estate, interest, lien, or incumbrance, and

granting the title to said property, or settling the lien or incumbrance thereon.

Art. 2173. (1504b) ACTUAL POSSESSION NOT NECESSARY; SERVICE, ETC.

Such action may be maintained by any such person whether he is in actual possession of such property or not; and service on the defendant or defendants may be made by publication of the writ of notice of the same, as is now or hereafter may be provided by law for publication of citation against non-residents, or persons.

Unknown or transient persons.

Art. 2174. (1504c) REQUISITE PLEADINGS. The pleadings in such case shall set forth the title of the complainant, as well as the claim of the defendant, if known, and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in, and to said property between the parties to said suit, and to decree the title or right of the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment, or order into effect.

Art. 6096 (3606) JOINT OWNER MAY COMPEL PARTITION. Any owner or claimant of any real estate, or of any interest therein, may compel a partition thereof between the joint owners or claimants thereof, in the manner provided in the succeeding articles of this chapter.

Art. 6097 (3607) PETITION FOR AND WHAT IT SHALL STATE. Such joint owner or claimant may file his petition in the district court of the county in which the real estate sought to be partitioned, or a portion thereof, is situated, which petition shall state.

1. The names and residence, if known, of each of the other joint owners, or joint claimants, of such real estate.

2. The share or interest which the plaintiff and the other joint owners, or claimants, of said real estate own or claim so far as known to the plaintiff.

3. The real estate sought to be partitioned shall be described in such manner as that the same may be distinguished from any other real estate, and the estimate value thereof stated.

ARTICLE 6100 (3610) COURT SHALL DETERMINE WHAT. Upon the hearing of the case the court shall determine;

1. The share or interest of each of the joint owners or claimants in the real estate sought to be divided.

2. All questions of law or equity affecting the title to such real estate, or any part thereof, which may arise.

ARTICLE 6116 (3626) PART OWNERS MAY COMPEL PARTITION. Part owners of personal property may be compelled to make partition beteewn them in the manner provided in the succeeding articles of this chapter.

ARTICLE 6117 (3627) SUIT SHALL BE COMMENCED, IN WHAT COURT. Suit for partition shall be commenced in the court having jurisdiction of the value of such property, in the same manner as other civil suits are commenced, and the several owners or claimants of such property shall be cited as in other cases.

ARTICLE 6122 (3632) PROVISIONS OF THIS TITLE SHALL NOT AFFECT, WHAT. The provisions of this title shall not affect the mode of proceeding perscribed by law for the partition of estates of decedents among the heirs and legatees, nor shall such provisions preclude partition in any other manner authorized by the rules of equity; which shall govern in proceedings under this title in all things not provided for in this title.

Art. 3235 (1869) (1817) IN WHOM PROPERTY VESTS UPON DEATH OF TESTATOR OR INTESTATE. When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; and all the estate of such person, not devised or bequeathed shall vest immediately in his heirs at law; but all of such estate, whether devised or bequeathed or not, except such as may be exempted by the law from the payment of debts, shall still be liable and subject in their hands to the payment of the debts of such testator or intestate; and, whenever a person dies intestate, all of his estate shall vest immediately in his heirs-at-law, but with the exceptions aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate; but, upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or the intestate, with the exceptions aforesaid; and it shall be the duty of such executor or administrator to recover possession of and hold such estate in trust to be disposed of in accordance with law.

ART. 3257 (1809) (1837) SERVICE OF SUCH CITATION, HOW MADE. The citation provided for in the preceding article shall be served by posting for at least ten days, exclusive of the day of posting, before the first day of the term of the court to which such citation is returnable.

ART. 3267 (1900) (1847) HOW A WRITTEN WILL IS PRODUCED IN COURT MAY BE PROVED.

A written will produced in court may be proved;

1. By the written affidavit of one of the subscribing witnesses thereto, taken in open court and subscribed by such witness.

2. If all the witnesses are non-residents of the county, or those resident of the county are unable to

attend court, it may be proved by the testimony of any one or more of them taken by deposition.

3. If none of the witnesses are living, it may be probated on proof by two witnesses of the handwriting of the subscribing witnesses thereto, and also of the testator, if he was able to write, which proof may be either by affidavit taken in open court and subscribed by the witnesses, or by deposition.

4. If the will was wholly written by the testator it may be probated on proof by two witnesses of his handwriting, which proof may also be made by affidavit taken in open court and subscribed to by the witnesses, or by deposition.

Art. 3276 (1909) (1856) WILL PROBATED IN ANOTHER STATE OR COUNTY MAY BE FILED AND RECORDER IN THIS STATE. Provided, that the validity of such will may be contested in the same manner as the original might have been.

Art. 7875 (5353) HOW FOREIGN WILL MAY BE PROVED. Provided, that, at any time within four years from the date of the record of such will in this state, the validity of such will may be contested in a proceeding instituted for that purpose, as the original might have been.

ART. 3358. (1991) (1938) DIRECTIONS IN WILL TO BE EXECUTED, UNLESS, ETC. When a will has been probated, its provisions and directions shall be executed, unless the same are annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate.

ART. 3359 (1992) (1939) PROCEEDINGS TO ANNUL DIRECTIONS IN WILL. Such proceeding shall be by application in writing, filed with the clerk of the court, setting forth the provisions and directions in the will that are objected to and the grounds of objection.

ART. 3362 (1995) (1942) TESTATOR MAY PROVIDE THAT NO ACTION BE HAD IN THE COURT, EXCEPT PROBATE OF WILL, ETC. Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and lists of claims of his estate.

ART. 3521 COUNTY COURT MAY DETERMINE AND DECLARE HEIRSHIP, ETC., when venue. When ever any person has died, or shall hereafter die, intestate, owning or being entitled to any real or personal property in this state, or any share or interest therein, and there shall have been no administration in this state upon the estate of decedent, and any real or personal property in this state has been omitted from such will or from such administration, or no final disposition thereof has been made in such administration, the county court of the county of this state in which such proceedings were last pending, or, in the event no will of such decedent has been admitted to probate in this state, and no administration has been granted in this state upon the estate of such decedent, then the county court of the county in which any of the real property belonging to such estate is situated, or, if there be no such real property, then of the county in which any personal property belonging to such estate may be found, may determine and declare in the manner hereinafter provided in this chapter, who are the heirs and only heirs of such decedent, and their respective shares and interests, under the laws of this state, in the estate of such decedent, and actions therefor shall be known as actions to declare heirship.

ART. 3527 (2154) (2099) APPLICATION FOR PARTITION AND DISTRIBUTION. All applications for the partition and distribution of an estate shall be in writing, and shall be filed with the clerk of the court in which the administration of the estate is pending.

Such application shall state:

1. The name of the person whose estate is sought to be partitioned and distributed.

2.. The names and residences of all persons entitled to share of such estate, and whether such persons are adults or minors, and if these facts be unknown to the applicant, it shall be so stated in the application, such application may be filed by any person interested in the estate.

ART. 3530 (2157) (2102) EXECUTOR, ETC., SHALL ALSO BE CITED, ETC. When the application is made by any other person than the executor or administrator of the estate, such executor or administrator shall be cited to appear and answer such application, and to file in court a full and complete exhibit and account of the condition of the estate, verified by affidavit, as in case of final settlement of such estate.

ART. 3556 (2183) (2128) SURVIVING HUSBAND OR WIFE MAY HAVE PARTITION OF COMMON PROPERTY. When any husband or wife shall die leaving any common property, the survivor may, at any time after letters testamentary or of administration have been granted, and an inventory, appraisement and list of the claims of the estate have been returned, make application in writing to the court which granted such letters for a partition of such common property, which application shall be acted upon at some regular term of court.

ART. 3559 (2186) (2131) COMMON PROPERTY SHALL BE HELD BY EXECUTOR ETC., UNTIL, ETC., UNTIL ANY SUCH PARTITION of common property is applied for and made as herein provided, the executor or administrator of the deceased shall have the right, and it shall be his duty, to recover possession of the creditors and others entitled thereto under the provisions of this title.

ART. 3593. (2220) (2165) WHEN THERE IS NO CHILD, ADMINISTRATION NOT REQUIRED. Where the husband or wife dies intestate, or becomes insane, having no child or children, and no separate property, the common property passes to the survivor, charged with the debt of the community; and no administration thereon or guardianship of the estate of the insane wife or husband shall be necessary.



FEB 23 1917

JAMES D. MAHER

CLERK

NO. [REDACTED]

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**In the Supreme Court of the United States
of America**

**ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL
E. KIRTLEY, ELIZABETH E. DAVIS, GEORGE D.
SUTTON, ID' KRICKBAUM, HELEN MARSHALL,**
Complainants

v

**JOHN H. C. L. ENGLISH, and F. S. FINLEY, and J. T.
ROBINSON, and W. E. FOSTER, Superintendent of
Public Instruction of Collin County, Texas, and District
Trustees of District Number 67, in the County of Collin
and State of Texas, and ROBERT L. CLAYTON, and
CORA D. SPENCER,**

Defendants

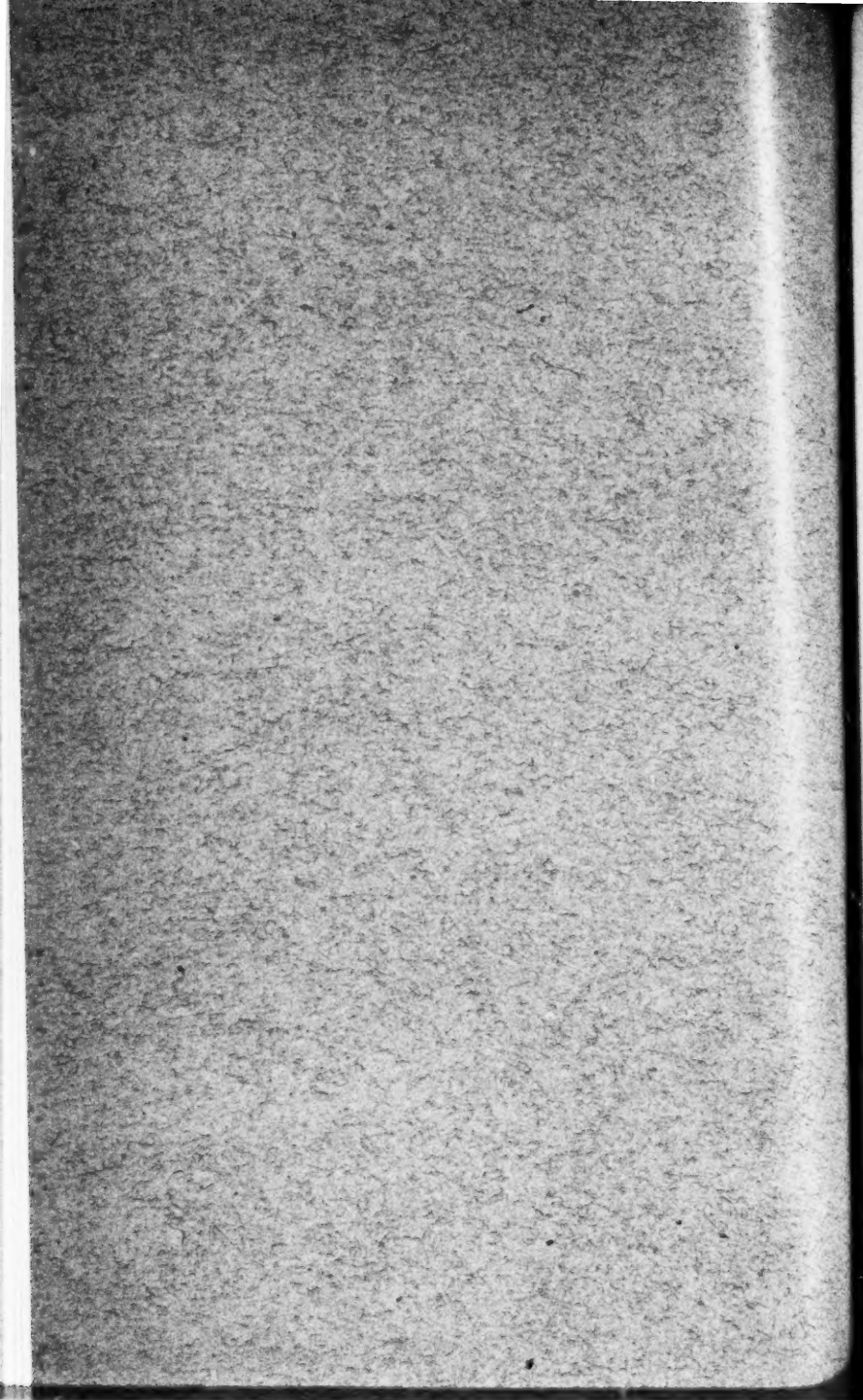
**Appeal from the United States District Court, for Eastern
District of Texas.**

The Hon. Gordon Russell, United States District Judge, Presiding

ALLEN G. FISHER, Chadron Nebraska
Solicitor for each Complainant.

**CECIL H. SMITH, Sherman, Texas,
WILLIAM R. ABERNATHY, McKinney, Texas,
MESSRS FREEMAN & BATSELL, Sherman, Texas,**
Solicitors for Defendants.

**Supplemental Citations to Brief of Appellant,
on Merits and Motion to Dismiss or Affirm**



**In the Supreme Court of the United States
of America**

**ALBERT E. SUTTON, DELANA M. SUTTON, RACHAEL
E. KIRTLEY, ELIZABETH E. DAVIS, GEORGE D.
SUTTON, IDA KRICKBAUM, HELEN MARSHALL,**
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v

**JOHN H. C. L. ENGLISH, and F. S. FINLEY, and J. T.
ROBINSON, and W. E. FOSTER, Superintendent of
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**Appeal from the United States District Court, for Eastern
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Solicitors for Defendants.

**Supplemental Citations to Brief of Appellant,
on Merits and Motion to Dismiss or Affirm**

May It Please the Court:

The Appellant desires to suggest the additional ground;

4. The District Court of Collin County, Texas, had jurisdiction of this partition as will appear from the following statutes again printed, and the Supreme Court of Texas has many times declared so. And the following quotations

are made with the hope that the same will not be so extensive as to weary the reader.

STATUTES APPLICABLE CONCERNING PARTITION

Art. 6096 (3606) JOINT OWNER MAY COMPEL PARTITION. Any owner or claimant of any real estate, or of any interest therein, may compel a partition thereof between the joint owners or claimants thereof, in the manner provided in the succeeding articles of this chapter.

Art. 6097 (3607) PETITION FOR AND WHAT IT SHALL STATE. Such joint owner or claimant may file his petition in the district court of the county in which the real estate sought to be partitioned, or a portion thereof, is situated, which petition shall state:

1. The names and residence, if known, of each of the other joint owners, or joint claimants, of such real estate.
2. The share or interest which the plaintiff and the other joint owners, or claimants, of said real estate own or claim so far as known to the plaintiff.
3. The real estate sought to be partitioned shall be described in such manner as that the same may be distinguished from any other real estate, and the estimate value thereof stated.

ARTICLE 6100 (3610) COURT SHALL DETERMINE WHAT. Upon the hearing of the case the court shall determine;

1. The share or interest of each of the joint owners or claimants in the real estate sought to be divided.
2. All questions of law or equity affecting the title to such real estate, or any part thereof, which may arise.

ARTICLE 6116 (3626) PART OWNERS MAY COMPEL PARTITION. Part owners of personal property may be compelled to make partition between them in the manner provided in the succeeding articles of this chapter.

ARTICLE 6117 (3627) SUIT SHALL BE COMMENC-

ED, IN WHAT COURT. Suit for partition shall be commenced in the court having jurisdiction of the value of such property, in the same manner as other civil suits are commenced, and the several owners or claimants of such property shall be cited as in other cases.

ARTICLE 6122 (3632) PROVISIONS OF THIS TITLE SHALL NOT AFFECT, WHAT. The provisions of this title shall not affect the mode of proceeding prescribed by law for the partition of estates of decedents among the heirs and legatees, nor shall such provisions preclude partition in any other manner authorized by the rules of equity; which shall govern in proceedings under this title in all things not provided for in this title.

TEXAS CITATIONS

In *Kalteyer et al., v Wipff, et al.*, 92 Tex. p. 682, the supreme court held as follows:

"In an action involving the elements of an equitable proceeding for accounting and partition, the court may, under the provisions of Batts Rev. St. art. 1335, grant all the relief to which the parties may be entitled either at law or in equity, including partition, although no prayer for such relief has been made in the petition. Where in an equitable action for partition, independent of the statute it appears that the property in controversy is not susceptible of division and the necessity of the case requires it, the court may order a sale of the property in the first instance, and a distribution of the proceeds, without appointing commissioners and receiving their report that no division can be made."

The Court stated its reason as follows:

"The minor became of age in October 1891, and on February 9, 1892, he instituted a proceeding in the district court, by certiorari to the probate court, to have the orders charging him with the advancement, the orders of sale and confirmation and the order finally settling the estate and discharging the administrator, reviewed and set aside.
* * * * He also filed an original suit in the district court on the 10th day of March, 1892, in which, as may be inferred from the record now before use, he sought a partition of the land, and an accounting between himself and his

sisters, as co-tenants. These two suits were afterwards, by agreement of all parties, consolidated, and ordered to be tried as one, and the children of Schmidt were dismissed from the suits by plaintiff. * * * *

The earlier decisions of this court warrant the proposition that the statute regulating partition does not prescribe an exclusive method of distributing real estate among joint owners. On the contrary, it has been recognized as the law that the statutory provisions may be found inadequate to meet the exigencies of many controversies which may arise, involving complicated questions, such as disputed titles and those arising out of an accounting preliminary to distribution, and that the jurisdiction belonging to courts of equity to grapple with and determine all such difficulties remains in our district court in all its fullness, undiminished by the statute. *Grassmeyer v Beeson*, 18 Tex. 766, 767; *Payne v Benham*, 16 Tex. 368. The fact that in a particular case the procedure prescribed by the statute has not been followed is not, therefore, conclusive of the questions whether or not the suit is one for partition, and whether or not the judgment rendered is the proper one.

* * * If the pleadings and proof establish a right in the party to any relief which a court of law or equity may grant him, the district court must, under this provision, extend it. If such relief cannot be obtained under the partition statute, it may not be assumed that it cannot be obtained at all. The nature of the present case required (1) the establishment of the disputed title of plaintiff and interveners to a share in the house and lot; (2) an accounting between the parties, and the ascertainment of any balance of money due from one to the other on account of an undue share or benefits received from the common estate; (3) the adjustment and satisfaction of the rights thus established. To secure all of this, the pleadings and proof were sufficient.

* * * * * The case evidently involved the elements of an equitable proceeding for accounting and partition. It is only by thus treating it that the court can, in our opinion, be authorized to charge upon the interest of the defendants the money found to be due plaintiff and intervenors for rents. * * * * The lien or charge of which the authorities speak is that which courts of equity enforce in decreeing final partition, and adjusting accounts and equities as a preliminary thereto. *Scott v Guernsey*, 60 Barb. 163; *Id.*, 48 N. Y. 106; *Wright v Wright*, 59 How. Prac. 186; *Freem. Co-Ten.* par. 512. * * * The decisions before

referred to establish the proposition that the statutory proceeding is not the exclusive one, and this has been embodied in the statute itself. Batts' Rev. St. Art. 3632. This distinction was not adverted to in *Keener v Moss*, but it was assumed that the statute necessarily controlled. Since equitable suits for partition may be maintained outside and independent of the statute, and by article 1335 the judgment must give to the parties all the relief to which they may be entitled either in law or equity, if a sale of the property is found essential to a complete enforcement of the rights established we think there can be no doubt that it is competent for the court to adjudge it. In the case of *Moore v Blagge*, 91 Tex. 151, 38 S. W. 979 and 41 S. W. 465. Justice Denman made a very careful review of the authorities, showing the practice of courts of equity in ordering sales of land for purposes of partition, and pointed out that it had been the practice in this state to order such sales, from the earliest history of its courts.

* * * The judgment of the court of civil appeals will therefore be reversed, and judgment will be here rendered that plaintiff and intervenors recover an interest of one-third in the property in controversy; that they also recover the moneys as specified in the judgment below; that the property be sold by the sheriff for cash, subject to approval of the district court, to which he shall report his action for that purpose; that the proceeds be returned into that court for distribution in accordance with the judgment.

In *James et al., v James et al.*, 164 S. W. Rep. 47, the Court of Civil Appeals held:

"Under the direct provisions of Rev. St. 1911, art. 6122, the procedure prescribed by statute for partition does not preclude partition being made in any other manner authorized by the rules of equity.

It is the court's duty to set apart plaintiffs' interest to them jointly in partition proceedings if they desire it."

And in the opinion, the Court reasoned well and without reversal by the Supreme Court, in the following language:

Annie James died intestate on February 27, 1901. Her

will contained the following clause: "I desire that all my property of every kind be divided in equal shares to my children excepting Scott H. James, his share to go to his children, he receiving nothing." At the time Annie James died, her son, Scott H. James, had four children, viz, Evelyn, Hugh S., Alfred H., and Edgar Y., but thereafter three others were born, Mary Josephine, born June 9, 1901; Ralph Y., born July 6, 1904; and Fannie Belle, born in 1907. On June 6, 1905, in a suit in the district court of Bexar county, Forty-Fifth district, entitled Evelyn James et al, v John H. James et al, being a partition suit among the devisees of Annie James, deceased, the plaintiffs therein were Evelyn James, Hugh S. James, Alfred H. James, Edgar Y. James, Mary Josephine James, and Ralph Y. James, and the defendants were the other devisees named in the will of Annie James, and in said suit there was set apart to the plaintiffs by the judgment of the court on June 6, 1905, the northern part of survey 49, Grantee A. Stafford, situated in Bexar county, containing 458 acres, more or less. On May 21, 1913 Evelyn James filed this suit against her brothers and sisters above named, and against Josephine Y. James as guardian of the persons and estates of all of them except Fannie Belle James, for the purpose of securing a construction of said will and determining her interest and the interest of her brothers and sisters in the land above described.

The court held that, while Ralph Y. James did not take under the will, he became entitled to an interest in the land by virtue of the judgment in the partition suit. It appears that said judgment vested the 458 acres in the plaintiffs in said suit, naming them. It does not appear that the interest of each plaintiff was determined as against the other plaintiffs, nor were the pleadings introduced to show whether or not the rights of the plaintiffs as between themselves were put in issue.

True, article 6100 of our statutes provides that in partition suits brought under the statutes the court shall determine: (1) the share or interest of each of the joint owners or claimants in the real estate sought to be divided; (2) all questions of law or equity affecting the title to such real estate, or any part thereof which may arise. But our courts need not follow the procedure prescribed by statute, and may partition in any other manner authorized by the rules of equity. Article 6122, Revised Statutes of 1911: Moore v Blagge, 91 Tex. 162, 38 S. W. 979, 41 S. W. 265; Kalteyer v

Wipff, 92 Tex. 682, 52 S. W. 63; *Gutheridge v Gutheridge*, 161 S. W. 895. It is frequently the case that, in partition suits, a group of litigants who are jointly entitled to a certain share of property do not wish a partition between themselves, but merely ask that they jointly be awarded a certain share. If denied such right, and compelled to partition as between themselves, the shares might be so small as to be practically valueless. If parties desire their interest to be set apart to them jointly, the court not only has the power, but it is a duty, to accede to their request. *Kremer v Haynie*, 67 Tex. 450, 3 S. W. 767; *Gorman v Campbell*, 135 S. W. 177.

We think it is clear that even in a partition suit such liberality of pleading is permitted and such power to enter judgments based upon and appropriate to the relief sought is held by the courts that no inference arises from the character of the suit that the pleadings required an investigation of the plaintiffs' rights against each other in said suit, or that the court in fact made such an investigation and determined such rights.

In *Gutheridge et al v Gutheridge*, 161 S. W. Rep. p 892, the Court of Civil Appeals held as follows:

"Rev. Civ. St. 1911, Art. 6097, providing the statutory mode of partition, is not exclusive and does not deprive the courts of their equitable power of partition"

This opinion has never been reversed and the reasoning below is upon the following state of facts:

"Under the direct provision of Rev. Civ. St. 1911, art. 6097, subd. 3, a petition for statutory partition is insufficient when not giving an estimate of the value of the premises.

Rev. Civ. St. 1911, art. 6097, providing a statutory mode of partition, is not exclusive and does not deprive the courts of their equitable power of partition.

Each of the defendants answered separately, * * *
His prayer is as follows: "Wherefore defendant prays judgment of the court that plaintiff take nothing by this suit except a partition of his land in Gray County, Tex., and

that all interest in said land be perfected in the present owners of the same, that the W. $\frac{1}{2}$ be perfected in J. M. Poff, and the E. $\frac{1}{2}$ be partitioned between C. B. Boverie and plaintiff, and for all further relief, both special and general, in law and in equity, that he may be entitled to under the law.

An inspection of the pleadings briefly set out above, together with the prayer, shows that the suit as originally instituted by plaintiff was not a partition suit brought either under the statute or as an equitable proceeding, but that the defendants, by their pleadings, endeavored to convert it into a suit for partition under the statute. There was a prayer for the appointment of commissioners, etc. Plaintiff seems to have acquiesced in this, but from some cause the purpose of going into partition of the property under the statute was abandoned, since the record fails to show the appointment of commissioners, the issuance of any writ of partition, or any report by commissioners. If appellants had persisted in their original purpose of having a partition of the property under the statute, their pleadings were manifestly insufficient under article 6097, R. S. 1911, subd. 3, which requires that a petition in such proceeding shall estimate the value of the premises.

It is held in this state that the giving of the remedy by statute has never been deemed to take away or in any degree abridge the original inherent powers of the court in an equitable proceeding for that purpose to partition real estate. The statute simply prescribes a procedure which parties may adopt if they see proper, but it is not obligatory. Our courts exercising the powers of courts of chancery may proceed to administer the relief upon the principles of equity, as fully and completely as if the proceedings had been brought and prosecuted under the statute. *Grassmeyer v Beeson*, 18 Tex. 753, 70 Am. Dec. 309; *Ellis v Rhone*, 17 Tex. 131; *Ross v Armstrong*, 25 Tex. Supp. 355, 78 Am. Dec. 574; *Payne v Benham*, 16 Tex. 364. We have investigated the question as fully as the authorities at hand would permit and have failed to find any case or any text-writer holding that it was necessary in a bill in equity to allege the value of the property sought to be partitioned.

And in *Moore et al. v Blagge, et al.* 91 Tex. p. 162, in an action of trespass to try title, the court reversed both lower courts which had denied jurisdiction in partition, holding

that "Equity has jurisdiction, independent of statute, to order property sold for partition;" and it especially held also that the District Court of Galveston County did have jurisdiction in that suit although the lower appellate court had determined "that the proper court to make such a sale, so as to bind the minor's estate, was the probate court in which the guardianship of said estate was pending;" nevertheless, jurisdiction of the District Court was sustained in this judgment by the Supreme Court.

Finally, although it be argued against complainants, still the holding in *Branch et al v Hanrick et al*, 70 Tex. 731, that: "Until the administration of an estate is closed, the County Court in Texas has exclusive jurisdiction to decree a partition of the lands of the estate among the heirs when the title is clear as among them, and there are no adverse claims by third persons," does not hold against us here. In that same case, the Court says: "The Court below did not pass upon the question of the effect of the partition suit pending in the District Court at the time this application was filed (in the estate in probate) * * * and that the appeal setting up merely the pendency of the suit in the District Court was not an answer to this application so far as it seeks to compel a settlement of the estate. What the action of the Court should be, upon the coming in of the administrator's report and account, we will not undertake to determine in advance. The facts are not sufficiently disclosed by the record to justify such an attempt. IT MAY BE THAT THE INTERESTS OF THE HEIRS IN THE LANDS MAY BE SO COMPLICATED WITH THAT OF THIRD PARTIES THAT A RESORT TO THE PROCESS OF A COURT OF EQUITY MAY BE NECESSARY IN ORDER TO SECURE A FAIR AND EQUITABLE ADJUSTMENT AND PARTITION. WE MEPELY DECIDE NOW THAT THE COURT SHOULD HAVE COMPELLED A SETTLEMENT."

And if it be contended that this case is controlled by *Blackwell v Blackwell*, 82 Tex. 807, it quickly will appear from the following, that such is a different case from the case made in the appeal of complainants: "The executor could not acquire title adverse to that of the heirs for whom he was trustee. 2 Perry, TRUSTS (3d ed.) sec. 863.

If a stranger had bought from Nancy Blackwell, it

would have been the duty of the executor at her death, the estate being in course of administration to recover the possession for the heirs. The executor being in possession at the death of the tenant for life, and it being his duty to take possession, his fiduciary character attached to that position and it became the possession of the heirs by their trustee. The title to the land and the possession were then united and the land was part of the estate for distribution under the will which the court was administering." But, in that case, "there is no question of title to be tried." While in the instant case the defendant District Trustees claim as title beneficiary and all the defendants confess the beneficial interest of District Trustees, either in a greater or lesser degree, and all the complaints deny the beneficial interest of District Trustees, so there is such a dispute as must be determined in equity.

Respectfully submitted,

Allen G Fisher

Solicitor for Complainants.

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